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Goldberg's Forgotten Footnote: Is There a Due Process Right to a Hearing Prior to the Termination of Welfare Benefits When the Only Issue Raised Is a Question of Law

Laura Cooper

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Goldberg's Forgotten Footnote: Is There a Due Process Right to a Hearing Prior to the Termination of Welfare Benefits When the Only Issue Raised Is a Question of Law?

Laura Cooper*

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I. INTRODUCTION

The federal government, in two different contexts, is currently reexamining the specific procedural protections that should be afforded welfare recipients who seek to challenge decisions of welfare agencies about their benefits. The Carter Administration and Congress are reviewing welfare hearing procedures as part of their interest in a fundamental reform of welfare programs.¹ Simultaneously, the Department of Health and Human Services (formerly HEW)² is considering revision of its regulations governing welfare hearings.³ Both reform efforts propose that welfare benefits be discontinued before a hearing decision is rendered for recipients who challenge the termination of their benefits on the ground that the action is inconsistent with law.⁴ For example, these proposals would continue benefits until after a hearing if the recipient was challenging the agency's factual conclusion that a reportedly absent father actually lived in the home, but would deny continued assistance if the recipient was challenging the legality of an agency policy that irregular visits from an otherwise absent

1. See H.R. 4904, 96th Cong., 1st Sess., 125 CONG. REC. H10284 (daily ed. Nov. 7, 1979) [hereinafter cited as Social Welfare Reform Amendments]; H.R. 10950, 95th Cong., 2d Sess., 124 CONG. REC. H1081 (daily ed. Feb. 15, 1978) [hereinafter cited as Better Jobs and Income Act].

2. The health and welfare responsibilities of the Department of Health, Education, and Welfare (HEW) have recently been assumed by the newly designated Department of Health and Human Services (HHS). This Article refers to the Department as HEW when discussing the history of its regulations.

3. See 44 Fed. Reg. 33,913 (1979).

4. See Better Jobs and Income Act, *supra* note 1, § 2144(a)(10); HEW Working Draft of Proposed Fair Hearing Regulations (June 7, 1979), § 13(c) (on file with the *Minnesota Law Review*). The House of Representatives has already passed a bill that would discontinue assistance to recipients raising an issue of law before they have an opportunity for a hearing. Social Welfare Reform Amendments, *supra* note 1, § 110(b). See text accompanying note 264 (language of the new section that would be added by the bill).

father preclude the child's welfare eligibility.⁵ The drafters of amendments to the federal statute and regulations governing welfare hearings have assumed that the decision whether differential procedural protections may be given to recipients on the basis of the nature of the issue raised can be made solely as a matter of policy, free from constitutional constraints. This Article examines the validity of that assumption and concludes that recipients challenging the legality of welfare agency actions, like those challenging agency factual determinations, are constitutionally entitled to continuation of their benefits until a decision is made after a hearing.

In the landmark decision of *Goldberg v. Kelly*,⁶ the Supreme Court held that due process requires an adequate hearing before termination of welfare benefits.⁷ The plaintiffs in *Goldberg* had asserted that their terminations were based on incorrect factual premises or misapplication of rules to the facts of their particular cases.⁸ Therefore, the Court's holding requiring prior hearings was necessarily limited to cases involving factual disputes or the application of legal standards to particular facts.⁹ The Court did not decide what procedural protections must be afforded to welfare recipients who, although not challenging the agency's understanding of the facts, argue that the intended termination of their welfare benefits is based on an incorrect construction of the applicable law. This Article addresses the issue left open in *Goldberg*: whether the Constitution permits a welfare agency to terminate benefits prior to a hearing decision if the only issue raised by the recipient is a question of law.

Part II briefly traces the historical background of the current federal regulation that gives states the discretion to terminate benefits prior to a hearing decision if the only issue raised is a question of law. Part III discusses the results of a survey designed to ascertain how the states have exercised this discretion. Part IV assesses the validity of the hearing regulation

5. One basis of eligibility for assistance under the program of Aid to Families with Dependent Children arises if a needy child is "deprived of parental support or care by reason of the . . . continued absence from the home . . . of a parent." 42 U.S.C. § 606(a)(1) (1976). The first issue, whether the father, is actually absent from the home, would be a question of fact. The second issue would involve legal definition, requiring interpretation of the federal statutory term "continued absence." Definitions and examples of categories of issues raised at welfare hearings are included in the Appendix, p. 1178 *infra*.

6. 397 U.S. 254 (1970).

7. *Id.* at 261.

8. *Id.* at 268. But see notes 40-41 *infra* and accompanying text.

9. 397 U.S. at 268 n.15. But see notes 42-43 *infra* and accompanying text.

under the Social Security Act. Part V explores the current constitutional standard for the denial of prior hearings, a discussion that serves as a basis for Part VI, which presents an empirical study of the efficacy of prior hearings on questions of law.

II. A HISTORY OF HEW POLICY CONCERNING WELFARE APPEALS ON QUESTIONS OF LAW

This Article focuses on hearings afforded to recipients of benefits under Aid to Families with Dependent Children (AFDC),¹⁰ a federal program that makes funds available to the states to assist the families of needy children who have been deprived of support or care by the death, incapacity, or continued absence from the home of a parent.¹¹

In order to comprehend the role of welfare hearings, it is useful to understand how welfare agencies determine the eligibility of recipients and the appropriate level of benefits. Applicants for assistance are required to submit a signed application form¹² that inquires about all relevant factors for eligibility, including composition of the household, income, expenses, and resources. Applicants may be required to submit documentary verification of the information entered on the form, such as paycheck stubs, birth certificates, or landlord statements.¹³

10. The AFDC program was established by the Social Security Act. 42 U.S.C. §§ 601-662 (1976 & Supp. II 1978). The costs of benefits and administration are provided in part by the federal government and in part by state funds. In some states, local government funds are also used to support the program. See STAFF OF SENATE COMM. ON FINANCE, 95TH CONG., 2D SESS., STAFF DATA AND MATERIALS ON PUBLIC WELFARE PROGRAMS 18-19 (Comm. Print 1978) [hereinafter cited as STAFF DATA].

11. 42 U.S.C. § 606(a) (1976). States also have the option of providing assistance under the AFDC program to children deprived of parental support by the unemployment of the child's father. *Id.* § 607. In 1978, twenty-six states, Guam, and the District of Columbia elected to provide benefits to families with unemployed fathers. STAFF DATA, *supra* note 10, at 11. The Supreme Court recently held that the restriction of the optional program to families with an unemployed father is an unconstitutional gender distinction and ordered that the benefits of the unemployed father's program be extended to families in which the mother satisfied the same standards. *Califano v. Westcott*, 443 U.S. 76 (1979).

12. 45 C.F.R. § 206.10(a)(1)(ii) (1979).

13. Federal regulations mandate that eligibility decisions be supported by facts in the case record, *id.* § 206.10(a)(8), but do not mandate the form in which those facts are recorded. States differ in the extent and variety of documentary verification demanded. See CONG. RESEARCH SERVICE, LIBRARY OF CONGRESS, 95TH CONG., 1ST SESS., REPORT TO THE HOUSE COMM. ON GOVERNMENT OPERATIONS, ADMINISTRATION OF THE AFDC PROGRAM 36-37 (Comm. Print 1977) [hereinafter cited as ADMINISTRATION REPORT].

Most states require a personal interview and many also require a visit to the applicant's home.¹⁴

Federal regulations require that the eligibility determination be made no later than forty-five days after submission of the application.¹⁵ In a majority of states, the government official who makes the eligibility determination is not required to have any education beyond the high school level.¹⁶ In most states, the initial eligibility decision is reviewed before payment is authorized.¹⁷ Approval rates for AFDC applications vary considerably from state to state. One study of application decisions in 1975 showed a variation in approval rates from twenty-five to eighty-five percent.¹⁸ Welfare agencies are required to reevaluate eligibility and benefit levels when any information about changed circumstances is received.¹⁹ Even in the absence of such information, federal regulations require states to redetermine eligibility no less frequently than every six months.²⁰

This Article examines the procedures afforded a recipient who seeks to challenge the bureaucratic determination that she²¹ is no longer eligible for assistance or that her level of benefits should be reduced. From the inception of the AFDC program, some kind of hearing has been afforded at least some people affected by adverse agency decisions; however, HEW has never mandated that states continue benefits until after a hearing decision when the issue to be considered is solely a question of law. When the Social Security Act first established the program for assistance to dependent children in 1935, it included a provision requiring the states to grant "to any individual, whose claim with respect to aid . . . is denied, an

14. See ADMINISTRATION REPORT, *supra* note 13, at 33, 39. The Supreme Court has upheld the constitutionality of requiring an applicant or recipient to submit to a home visit as a condition for AFDC eligibility. *Wyman v. James*, 400 U.S. 309 (1971).

15. 45 C.F.R. § 206.10(a)(3)(i) (1979).

16. See ADMINISTRATION REPORT, *supra* note 13, at 44-45.

17. *Id.* at 46.

18. *Id.* at 52.

19. 45 C.F.R. § 206.10(a)(9)(ii) (1979).

20. *Id.* § 206.10(a)(9)(iii). At the time of redetermination, states require submission of information forms and documentary verification similar to that required for the initial determination. See ADMINISTRATION REPORT, *supra* note 13, at 42.

21. This Article uses the feminine gender to refer to AFDC recipients since the vast majority of recipient families are headed by women. See U.S. DEPT OF HEALTH, EDUC., AND WELFARE, PUB. NO. 79-11721, AID TO FAMILIES WITH DEPENDENT CHILDREN: A CHARTBOOK (1979).

opportunity for a fair hearing before [the] state agency."²² In 1950, the Act was amended to add an opportunity for a hearing when claims for benefits were "not acted upon with reasonable promptness."²³ The statutory provisions for fair hearings, however, were never interpreted by HEW to require a hearing prior to termination of assistance.²⁴ Indeed, before 1968, HEW was unwilling even to permit federal financial participation in payments made by a state to a recipient in the period between the initial agency determination of ineligibility and the fair hearing.²⁵

HEW broadly interpreted the statutory hearing requirement with respect to both the circumstances under which hearings were to be afforded and the scope of the hearings that states were required to conduct. HEW required an opportunity for a hearing not only when assistance was denied or delayed, but also whenever an individual was "aggrieved by any other agency action affecting his receipt or termination of assistance, or by [any] agency policy as it affects his situation."²⁶ Furthermore, HEW mandated that the opportunity for a fair hearing include "[c]onsideration of the agency's interpretation of the law, and the reasonableness and equitableness of the policies promulgated under the law, if the claimant is aggrieved by their application to his situation."²⁷ Thus, in January 1968, when the first group of New York plaintiffs filed their complaint in the lawsuit that was to become *Goldberg v. Kelly*, the law afforded recipients a post-termination hearing that would permit a challenge to agency law and policy, but did not provide for any type of hearing, or even for notification of an intent to terminate, prior to the actual cessation of benefits.

In July 1968, after the initial *Goldberg* complaint was filed, HEW issued a new directive requiring states to give advance

22. Social Security Act, Pub. L. No. 74-271, § 402(a)(4), 49 Stat. 620, 627 (1935) (current version at 42 U.S.C. § 602(a)(4) (1976)).

23. Social Security Act Amendments of 1950, Pub. L. No. 81-734, § 321(a), 64 Stat. 477, 549 (current version at 42 U.S.C. § 602(a)(4) (1976)).

24. *Goldberg v. Kelly*, 397 U.S. 254, 257 n.3 (1970).

25. See Brief for United States as Amicus Curiae at 10-11, *Goldberg v. Kelly*, 397 U.S. 254 (1970).

26. U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION § 6200(b) (1968) [hereinafter cited as HANDBOOK]. See A. KEITH-LUCAS, DECISIONS ABOUT PEOPLE IN NEED 161 (1957) (quoting an earlier edition of the *Handbook*). Despite broad availability, hearings were only infrequently sought by recipients in the years preceding *Goldberg*. See J. HANDLER & E. HOLLINGSWORTH, THE "DESERVING POOR": A STUDY OF WELFARE ADMINISTRATION 199-200 (1971); A. KEITH-LUCAS, *supra*, at 163; Comment, *Texas Welfare Appeals: The Hidden Right*, 46 TEX. L. REV. 223, 223 (1967).

27. HANDBOOK, *supra* note 26, § 6300(c)(2).

notice that adverse action was planned and to provide recipients with an opportunity to discuss their situations before the action took effect.²⁸ HEW also provided for an additional thirty days of federal matching funds for states to maintain benefits until this informal conference could be held.²⁹ The state regulations challenged by the *Goldberg* plaintiffs³⁰ were not in conformity with these HEW rules.³¹ The district court held that it was a violation of due process to terminate welfare benefits unless there was notice and a hearing before an impartial hearing officer at which the recipient could confront and cross-examine witnesses.³²

Less than one week after the district court opinion was issued, HEW published a proposed rule that would require states to continue welfare benefits until after a fair hearing decision had been rendered.³³ The proposed regulation limited the right to continued benefits to those fair hearings "involving an issue of fact, or of judgment relating to the individual case, between the agency and the appellant."³⁴ Although the regulation was

28. See *Kelly v. Wyman*, 294 F. Supp. 893, 896 (S.D.N.Y. 1968) (citing *HANDBOOK*, *supra* note 26, § 2300(d)(5)).

29. See *HANDBOOK*, *supra* note 26, § 5514.

30. See *Kelly v. Wyman*, 294 F. Supp. 893, 897 n.7 (S.D.N.Y. 1968).

31. While the case was pending in federal district court, HEW was engaged in negotiations with New York to make the required revisions in the New York plan. See *id.* at 898 n.9. One apparent nonconformity in the New York regulation was its provision for an opportunity to make a written submission, rather than the opportunity to appear in person for an informal conference as required by the HEW rule. The negotiations between HEW and New York were exercised under HEW's statutory authority to discontinue the payment of federal funds to any state found to be in substantial noncompliance with the requirements of federal law. 42 U.S.C. § 604(a) (1976). The procedures used by HEW in ascertaining nonconformity are now specified by regulation. See 45 C.F.R. § 213 (1979).

32. The district court explicitly declined to decide whether "procedural due process requires the right to oral argument on a matter of law." *Kelly v. Wyman*, 294 F. Supp. 893, 903 (S.D.N.Y. 1968) (citing *FCC v. WJR*, 337 U.S. 265 (1949)).

The plaintiffs claimed that the New York regulations violated due process, the Social Security Act, and the HEW regulations. 294 F. Supp. at 895. Since some of the plaintiffs in the lawsuit were recipients of assistance under programs financed solely by state and local funds to which the federal statutes and regulations were inapplicable, the three-judge court chose not to consider the Social Security Act and regulatory claims because the constitutional issue would have to be decided nevertheless. *Id.* at 902.

33. 33 Fed. Reg. 17,853 (1968).

34. *Id.* 17,853; 17,854. State governors and welfare administrators expressed opposition to the proposed regulation. See, e.g., Special Assistance for Policy Coordination and Public Inquiries Division, Assistance Payments Administration, U.S. Dep't of Health, Education, and Welfare, Analysis of Comments Received on Fair Hearings, Thirteenth Policy Issuance (Dec. 30, 1968) (on file with the *Minnesota Law Review*).

promulgated,³⁵ it was subsequently revoked³⁶ and never became effective.

When *Goldberg* came before the Supreme Court for oral argument, an HEW rule then in effect required states to give advance notice and an opportunity for an informal conference before terminating welfare benefits. The proposed regulations that would have required a formal hearing prior to termination for cases presenting questions of fact or judgment had not yet become effective.³⁷ The Court affirmed the district court's decision and held that "due process requires an adequate hearing before termination of welfare benefits."³⁸ The Court then detailed the procedures that would satisfy due process in the kinds of cases then before the Court.³⁹ The Court characterized these cases as instances "where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases."⁴⁰ In making this characterization, the Court failed to acknowledge a disagreement between the plaintiffs and the federal government about whether some of the consolidated cases raised purely legal issues,⁴¹ and thus avoided the more difficult issue of what proce-

35. In January 1969, in the closing days of the Johnson Administration, HEW Secretary Wilbur J. Cohen approved the promulgation of the new regulation to govern fair hearings. The new regulation included the same language restricting continued assistance to cases raising issues of fact or judgment used in the proposed regulation. 34 Fed. Reg. 1144 (1969) (proposed for codification at 45 C.F.R. § 205.10(a)(1)). The effective date of the 1969 regulation was postponed by Robert H. Finch, the new HEW Secretary in the Nixon Administration. See 34 Fed. Reg. 13,595 (1969).

36. 34 Fed. Reg. 10,591 (1970).

37. See *Goldberg v. Kelly*, 397 U.S. 254, 257 n.3 (1970).

38. *Id.* at 261. In a companion case to *Goldberg*, *Wheeler v. Montgomery*, 397 U.S. 280 (1970), Justices Burger and Black argued in dissent that it would have been appropriate to "hold the heavy hand of constitutional adjudication" and allow the proposed regulations to take effect subject to later judicial review. *Id.* at 282 (Burger, J., dissenting).

39. The Court mandated the provision of timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity for the recipient to defend by confronting any adverse witnesses and by presenting oral arguments and evidence. 397 U.S. at 267-68. The Court also required that recipients have the opportunity to retain an attorney, although an attorney need not be provided. *Id.* at 270. The Court also provided that the person assigned to decide the case must be impartial, and stated that impartiality could be achieved if the decisionmaker had not participated in making the determination under review. *Id.* at 271. The Court required that cases be decided on the hearing record and that the decisionmaker state the reasons for the decision and the evidence relied upon. *Id.*

40. *Id.* at 268.

41. This disagreement centered on the case of Mrs. Altagracia Guzman. Mrs. Guzman had been threatened with termination of her AFDC benefits un-

dures would be required when a hearing was requested solely to consider a question of law. In a footnote to the opinion, the Court stated:

This case presents no question requiring our determination whether due process requires only an opportunity for written submission, or an opportunity both for written submission and oral argument, where there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues.⁴²

HEW immediately assumed that this footnote authorized welfare agencies to terminate benefits prior to a hearing decision when there was no factual dispute involved.⁴³ Both the text of the footnote and the context in which it was placed, however, more strongly support a conclusion that the Supreme Court was not concerned with whether due process required a prior hearing for these cases, but rather what kind of prior hearing would be required.⁴⁴ The footnote was contained not in Part I

less she cooperated in an action for support against her husband. 397 U.S. at app. 23a-25a. The complaint alleged that her proposed termination was "based upon a policy of the Department which has no support at law and indeed is contrary to the statutes of New York State." *Id.* at app. 25a. Despite the allegation in their complaint, the attorneys representing the welfare recipients argued that, in retrospect, it had become apparent that the issue raised by Mrs. Guzman involved a "substantial question of judgment in the application of the policy invoked." Brief for Appellees at 68 n.81, *Goldberg v. Kelly*, 397 U.S. 254 (1970). The United States, however, insisted that Mrs. Guzman's case challenged "only the provisions of law or settled agency policy." Brief of the United States as Amicus Curiae at 33. The Court characterized the Guzman hearing as one involving the applicability of departmental policy to the facts of a case. *See* 397 U.S. at 256 n.2. It is interesting that five years later the Supreme Court decided as a matter of law that New York's requirement of recipient cooperation in paternity and support actions as a condition of eligibility for AFDC was in violation of the Social Security Act. *Lascaris v. Shirley*, 420 U.S. 730 (1975). In *Lascaris*, the Supreme Court found it unnecessary to render an extended opinion because an amendment to the Social Security Act had made such cooperation an explicit statutory eligibility condition. Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337, 2359 (1975) (current version at 42 U.S.C. § 638 (1976)).

42. 397 U.S. at 268 n.15 (citing *FCC v. WJR*, 337 U.S. 265, 275-77 (1949)).

43. In an internal memorandum written less than a month after the *Goldberg* decision, the agency administrator was informed that "[t]he continuation of assistance pending a hearing decision is limited to issues of fact with regard to the individual situation." Possible Alternative Policy Positions regarding the Supreme Court Decision's [*sic*] re "Due Process," Attachment to Memorandum from John J. Hurley, Deputy Administrator, Assistance Payments Administration, to John D. Twiname, Administrator, Social and Rehabilitation Service, at 1 (Apr. 14, 1970) (on file with the *Minnesota Law Review*) [hereinafter cited as Possible Alternative Policy Positions]. The same policy remains in effect today. *See* 45 C.F.R. § 205.10(a)(6)(i)(A) (1979).

44. This conclusion is reinforced by the Court's citation of *FCC v. WJR*, 337 U.S. 265, 275-77 (1949). On the specifically cited pages in that opinion the Court had stated that the determination of whether due process requires an oral hearing or merely an opportunity to submit a written statement depends on the circumstances.

of the opinion, which held that due process required a pre-termination hearing, but rather in Part II, which considered what specific procedures would be required.⁴⁵

Following the Supreme Court's decision in *Goldberg*, HEW returned to its abandoned project,⁴⁶ promulgating a regulation to implement the court decisions on prior hearings. HEW began with the assumption that states should be permitted to terminate welfare benefits prior to a hearing decision when the only issue raised is a question of law. The only questions which, in HEW's view, had to be resolved with regard to this policy were (1) the extent to which it would be necessary to define the categories of legal and factual issues; (2) which official should make the determination of whether the case fell into a category for which assistance was to be continued until a hearing decision; and (3) the appropriate point within the procedure for this determination to be made.

The first proposed regulation to respond to *Goldberg* was published two months after the Supreme Court's decision.⁴⁷ The proposed regulation limited the circumstances under which assistance would have to be continued pending the hearing to cases involving "an issue of fact or of judgment relating to the individual case."⁴⁸ In making the determination of whether there was an issue of fact or judgment, states were to

45. See 397 U.S. at 267.

46. See notes 33-36 *supra* and accompanying text.

47. 35 Fed. Reg. 8448 (1970) (proposed for codification at 45 C.F.R. § 205.10). HEW combined into a single proceeding the hearing required by the Supreme Court and the "fair hearing," see notes 22-23 *supra* and accompanying text, mandated by the Social Security Act. See 35 Fed. Reg. 8448 (1970) (preamble). The possibility of a combined hearing had been recognized by the Supreme Court in *Goldberg*. See 397 U.S. at 267 n.14. A single, pre-termination fair hearing before the state agency was favored by HEW over the alternative of a combination of a pre-termination local hearing and an opportunity for a post-termination state "fair hearing," in part because of the expectation that state policy would be improved in response to issues brought to the state's attention through the hearing process. See Possible Alternative Policy Positions, *supra* note 43, at 2.

48. The proposed regulation provided in part:

When a fair hearing, requested because of termination or reduction of assistance, involves an issue of fact or of judgment relating to the individual case (including a question whether State agency rules or policies were correctly applied to the facts of the particular case), assistance is continued during the period of the appeal and through the end of the month in which the final decision on the fair hearing is reached.

35 Fed. Reg. 8448, 8449 (proposed for codification at 45 C.F.R. § 205.10(a)(5)). Portions of section 205.10 are being amended, see 45 Fed. Reg. 20480 (1980); since the current amendments are not relevant to this Article further reference to them will not be made.

be guided by criteria⁴⁹ to be issued by the Social and Rehabilitation Service,⁵⁰ the subagency of HEW then administering the AFDC program.

The regulation to implement the *Goldberg* decision, largely unchanged from the proposed regulation, became effective in April 1971.⁵¹ The most significant changes clarified the circumstances in which the states were to continue benefits and the procedures by which they were to determine whether the maintenance of benefits was appropriate. Although the proposed regulation appeared to allow the local agencies to make

49. HEW issued a draft of criteria for the review and comment of state administrators and interested organizations. The draft criteria made little attempt to define the crucial terms, but rather offered a series of illustrative examples. Draft: Criteria for Determining When Assistance Must Be Continued Pending a Fair Hearing Involving an Issue of Fact or Judgment, *appended to Social and Rehabilitation Service, U.S. Dep't of HEW, Information Memorandum AO-IM-19* (May 29, 1970) [hereinafter cited as Draft Criteria]. The examples of judgment issues involved exclusively situations in which the recipient claimed that the welfare agency had misconstrued applicable state policy and included no cases requiring assessment of unique facts. *Id.* at 1-4. The broad scope given to issues of judgment appeared to undermine the stated policy of the agency to limit the provision of assistance pending a hearing decision to cases involving "issues of fact with regard to the individual situation." *Id.* at 4. See note 43 *supra* and accompanying text. The only category of cases described by the draft criteria for which assistance would not have to be continued were those raising "issues of agency policy." Included within this category were mere protests of agency policy, as well as claims of inconsistency between state and federal requirements or challenges to the constitutionality of state policies. Draft Criteria, *supra*, at 4-5. Recipient and legal groups objected to the draft criteria. Social and Rehabilitative Service, U.S. Dep't of HEW, Outline, Fair Hearing Regulation Summary of Respondents to the Proposed Rule Making AO-IM-19, May 29, 1970, and Chief Issues (1970) at 9. The standards ultimately issued by HEW were substantially changed from the initial draft.

50. 35 Fed. Reg. 8448, 8449 (1970) (proposed for codification at 45 C.F.R. § 205.10(a)(5)(ii)). The welfare agencies were also required, under the proposed regulation, promptly to inform a recipient whether aid would be continued and afford the recipient prompt reconsideration by the state on the issue of continuation. 35 Fed. Reg. 8448, 8449 (1970) (proposed for codification at 45 C.F.R. § 205.10(a)(5)(iii)).

51. 36 Fed. Reg. 3034 (1971) (codified at 45 C.F.R. § 205.10 (1972)). The effective date of the regulation came nearly three and one-half years after HEW had first proposed a regulation to provide for the continuation of welfare benefits until after a hearing. The agency's delay in issuing fair hearing regulations was evidently a subject of some irritation to the administrator of the Social and Rehabilitation Service. In a memorandum to the HEW Secretary requesting promulgation of the final regulation, he wrote: "Finally, it is imperative that this regulation be issued as soon as possible. As has already been indicated, HEW has been massaging this regulation for over two years." Memorandum from John D. Twiname, Administrator, Social and Rehabilitation Service, to Secretary Elliot L. Richardson, at 5 (Feb. 1, 1971) (on file with the *Minnesota Law Review*).

the determination,⁵² the regulation as implemented required that the crucial determination of when continuation was appropriate be made by the state agency rather than the local agencies.⁵³ Under the regulation, benefits had to be continued in all cases until that determination was made.⁵⁴ Furthermore, states were given the option to maintain assistance until after the hearing in all cases, regardless of whether an issue of fact or judgment was involved.⁵⁵ A bulletin issued to the state administrators simultaneously with the promulgation of the regulation explained: "We recognize that it may be difficult in some instances to make this distinction and would not want to penalize any State that, in the interest of simplified administration, continues assistance in all cases."⁵⁶

In May 1971, the Social and Rehabilitation Service issued to the states the promised criteria for distinguishing categories of issues. The standards provided that issues of fact or judgment included "issues of the application of State law or policy to the facts of the individual situation."⁵⁷ Issues of law or policy were distinguished as those arising in cases in which the agency could not rule in favor of the recipient without a change in agency policy or state law.⁵⁸ HEW, apparently deliberately, gave no guidance regarding the proper categorization of cases in which the recipient was seeking clarification or correct local application of a state policy that would be uniformly applied to others in similar factual circumstances.

As early as three months after HEW had completed its articulation of the fair hearing policy, a pattern of defiance by

52. 36 Fed. Reg. 3034 (1971).

53. See 45 C.F.R. § 205.10(a)(5)(iii)(a)(1) (1972).

54. *Id.*

55. 36 Fed. Reg. 3034 (1971) (codified at 45 C.F.R. § 205.10(a)(5)(iii)(b) (1972)).

56. SOCIAL AND REHABILITATION SERVICE, U.S. DEPT OF HEW, SRS PROGRAM REGULATION 10-2 (C-3) 2, Feb. 13, 1971.

57. ASSISTANCE PAYMENTS ADMINISTRATION, U.S. DEPT OF HEALTH, EDUCATION, AND WELFARE, FINANCIAL ASSISTANCE MANUAL § 6-30-20, at 6 (1971) [hereinafter cited as FAIR HEARING GUIDES].

58. *Id.* The agency also listed a number of examples, including the following:

An example of an issue involving application of agency policy to the individual situation may arise from the use of a ratable reduction. If there is a question whether the formula for reducing the grant was correctly applied in an individual case, it is an issue of fact or judgment and assistance must be continued. If the individual challenges the use of a ratable reduction, he is questioning the policy itself, and assistance would not need to be continued during the fair hearing process.

Id.

state administrators began to emerge.⁵⁹ In September 1971, the Assistance Payments Administration of the Social and Rehabilitation Service reported noncompliance with the hearing regulation in nineteen states.⁶⁰ Several of these states were not merely delaying compliance, but had affirmatively expressed an intention not to comply on the ground that the regulations exceeded HEW's authority.⁶¹ The compliance reports for several states mentioned litigation or the threat of litigation against HEW.⁶² Faced with the states' opposition and

59. One of the earliest signs of revolt was a letter to Secretary Richardson from the state of Arizona, informing him that Arizona did not intend to comply with some of the provisions of the regulation and threatening to sue HEW if it would not be possible to arrange an accommodation of some of the regulation's requirements. Letter from Arizona Assistant Attorney General James B. Feeley to HEW Secretary Elliot L. Richardson (Aug. 27, 1971) (on file with the *Minnesota Law Review*). One of Arizona's concerns was the requirement that states provide a hearing, although not prior to the termination of benefits, for a recipient who was affected by a change in law or policy. *Id.* See 36 Fed. Reg. 3034 (1971) (codified at 45 C.F.R. § 205.10(a)(5) (1972)). In October 1971, Arizona filed suit against HEW, contending that the federal hearing regulation violated the Social Security Act. *Arizona v. Richardson*, No. Civ. 71-563 PHX-WCF (D. Ariz. June 16, 1972), reprinted in Jurisdictional Statement at 24-33, *Carleson v. Yee-Litt*, 412 U.S. 924 (1973). The district court stated, "Any hearing on . . . rules or regulations without any issue of fact being involved is useless and will tend to destroy our historic doctrine or principles of representative form of government [*sic*]." *Id.* at 31. The court found that the federal regulation exceeded HEW's authority under the Social Security Act and enjoined the agency from enforcing the regulation requiring states to hold hearings arising out of changes in law or policy. *Id.* at 33. HEW's determination to pursue an appeal waned as efforts began within HEW to amend the hearing regulation to allow all states to deny hearings, as Arizona had done, when the hearing request arose out of a change in the law. See Docket, *Arizona v. Richardson*, No. Civ. 71-563 PHX-WCF (D. Ariz. Aug. 14, 1972). Later in 1973, after the federal language had been amended to incorporate the denial of such hearings, the Ninth Circuit, upon the motion of both parties, vacated the district court judgment and remanded the case with directions that it be dismissed on the ground of mootness. *Arizona v. Weinberger*, No. 92-2610 (9th Cir. Sept. 13, 1973).

60. Assistance Payments Administration, Social and Rehabilitation Service, U.S. Dep't of Health, Education, and Welfare, APA Compliance Report 9/30/71, Fair Hearings [hereinafter cited as Compliance Report], *Enclosed with Memorandum from Administrator, Social and Rehabilitation Service* [John D. Twinn], to Secretary [Elliot L. Richardson] (Dec. 15, 1971) (both on file with the *Minnesota Law Review*).

61. These states included New York, North Carolina, and Tennessee. Arizona, Colorado, and New Jersey expressed an intention not to comply but did not state a reason. Compliance Report, *supra* note 60, at 16.

62. In addition to the Arizona suit, discussed in note 59 *supra*, the report indicated that New York had filed suit and North Carolina had notified the agency that it would join other states in a suit against HEW challenging the regulations as more stringent than required by *Goldberg*. Compliance Report, *supra* note 60, at 19. In New Jersey, the state defended a recipient action for enforcement of the federal regulation on the ground that promulgation of the regulation exceeded HEW's statutory authority. *Serritella v. Engleman*, 339 F. Supp. 738, 751 (D.N.J. 1972). Characteristic of the mood in many states was the

threatened litigation, the HEW Secretary directed the Social and Rehabilitation Service to provide him with analysis of the fair hearing requirements, their fairness to beneficiaries, and their burden on the states.⁶³ When the requested analysis finally emerged, the Administrator of the Social and Rehabilitation Service recommended that HEW's policy on fair hearings be continued without change.⁶⁴

The Administrator's analysis had demonstrated to the Secretary just how controversial the issue of policy hearings had become. It was clear that some states would continue to protest vigorously the enforcement of existing regulations and that recipient organizations would have strong objections to any change. The Secretary's reaction to the Administrator's analysis and recommendation was apparently a decision not to decide—the issue was returned to the Assistance Payments Administration for further study.

As part of its renewed study during the spring of 1972, the Assistance Payments Administration conducted a series of meetings with state welfare administrators and representatives of the National Welfare Rights Organization (NWRO) to discuss the agency's fair hearing policies. The states expressed objections to the *Goldberg* requirement that benefits be maintained pending a hearing even when issues of fact or judgment were involved. Some states reported large numbers of what they considered to be frivolous hearings and increased costs in millions of dollars. Although several states objected to the specificity of the HEW regulations and the rigidity with which they felt the regulations were being enforced,⁶⁵ Maryland

following note in the Compliance Report regarding negotiations between the Tennessee welfare agency and the HEW regional office on compliance with the fair hearing requirements. "At one point during regional negotiation, agency was on verge of implementing the regulation, but when it discovered that other States were objecting to it, [the agency] decided to be in the 'non-compliance' camp." Compliance Report, *supra* note 60, at 20.

63. Memorandum from Deputy Assistant Secretary for Management Planning and Technology [Thomas S. McFee] to The Secretary [Elliot L. Richardson], Subject: SRS Management Conference held on November 9, 1971, at 3 (Nov. 16, 1971) (on file with the *Minnesota Law Review*).

64. Memorandum from Twiname to Richardson, *supra* note 60, at 6-7. The Administrator wrote to the Secretary that amending the regulation to satisfy the noncomplying states "would represent a substantial pull-back in the Department's long standing position that the recipient may have a fair hearing on matters of policies as they affect his individual situation. This requirement assures a voice to consumers who ordinarily have to speak for themselves. A change would without doubt be strongly opposed by recipient groups." *Id.* at 5.

65. Assistance Payments Administration, Social and Rehabilitation Service, U.S. Dep't of Health, Education, and Welfare, Report on Meeting with State

wanted greater guidance from HEW on hearing procedures and particularly asked for more explicit federal guidelines to assist states in distinguishing between questions of law or policy and questions of fact or judgment.⁶⁶ NWRO questioned whether the states could substantiate their claims for the burdensomeness of the regulations if they had never made a good faith effort to comply.⁶⁷ NWRO expressed doubts about the accuracy of state procedures for distinguishing between questions of fact and questions of policy and requested that HEW develop precise procedures to guide the states in this determination.⁶⁸

In July, the Commissioner of the Assistance Payments Administration sent a questionnaire to the states asking them to document the costs to the states, to express their dissatisfaction with provisions of the regulation, and to comment on some possible changes to the existing hearing regulation.⁶⁹ All of the questions to the states were designed to elicit specific facts and data to support amendments to the rule.⁷⁰ Nowhere in the questionnaire were the states asked to comment on those portions of the rule that they found satisfactory or useful in the administration of their public assistance programs.

In December 1972, the Administrator of the Social and Rehabilitation Service presented to the Secretary of HEW a compilation of the results of the survey of state welfare

Administrators on Fair Hearings (Apr. 4, 1972) (on file with the *Minnesota Law Review*).

66. Maryland specifically requested further detail on "(1) what should be the order of testimony; (2) who should have the burden of proof; (3) what should be the particular content of a hearing decision." *Id.* at 7.

67. Assistance Payments Administration, Social and Rehabilitation Service, U.S. Dep't of Health, Education, and Welfare, Report on Meeting with NWRO [National Welfare Rights Organization] Representatives on Fair Hearings 2 (May 16, 1972) (on file with the *Minnesota Law Review*).

68. *Id.* at 3.

69. Memorandum from Commissioner, Assistance Payments Administration [John L. Costa], to SRS Regional Commissioners, Attention: Associate Regional Commissioners, APA (July 24, 1972) (on file with the *Minnesota Law Review*).

70. The following inquiry from the questionnaire is illustrative of the nature of the effort:

ISSUE ONE: A primary cause of the increase in fair hearing requests and the additional costs States are experiencing is due to capricious requests for hearings initiated by persons trying to make unnecessary work and trouble for the agency.

QUESTION: Please provide documentation with regard to any additional costs your State may be incurring due to capricious requests for hearings including, if possible, the numbers of such requests on a monthly or quarterly basis.

Id.

administrators. Four of the eight states that participated in the spring meeting failed to produce any substantiation of their claims that the regulation was unduly burdensome. On most issues, the states reported that they had no problems with the existing regulation, although some states continued to report difficulty in identifying questions of law or policy.⁷¹

It was not until the spring of 1973, after Caspar W. Weinberger had replaced Elliot L. Richardson as Secretary, that HEW formally proposed to amend the hearing regulation⁷² to give states greater flexibility in designing their own administrative procedures. The preamble to the proposed regulation expressed the hope that the greater latitude given to the states would result in the elimination of error and the reduction of unnecessary program costs. Under the proposed regulation, states could satisfy the *Goldberg* requirement of a pre-termination hearing by a proceeding before either the state agency or the local welfare agency. The proposed rule would have removed the requirement that the determination of whether the case raised an issue of fact or judgment had to be made by the state agency, giving states the option of making that assessment at the local level.⁷³ The proposed rule also omitted the requirement that the determination be made in accordance with

71. Memorandum from Administrator, Social and Rehabilitation Service [John D. Twiname], to Secretary, HEW [Elliot L. Richardson] (Dec. 19, 1972) (on file with the *Minnesota Law Review*) [hereinafter cited as December 1972 Memorandum]. Michigan reported confusion in understanding the phrase "issues of law or policy." Requirement for Fair Hearings on Issues of Law or Policy, Tab A of December 1972 Memorandum, *supra*, at 2. Alabama requested further federal guidelines for distinguishing questions of policy from issues of fact or judgment. State Responses on Issue Four, Tab C of December 1972 Memorandum, *supra*, at 1.

72. See 38 Fed. Reg. 9819 (1973). The proposed regulation was incorrectly published by the Federal Register in the section reserved for the promulgation of rules. Letter from Rose Steinman, Finding Aids Unit Chief, National Archives and Records Service, Office of the Federal Register, to Professor Laura Cooper (June 29, 1978) (on file with the *Minnesota Law Review*) [hereinafter cited as Steinman Letter].

73. This amendment was proposed over the strong objections of John L. Costa, Commissioner of the Assistance Payments Administration. In a letter to the Administrator of the Social and Rehabilitation Service, Costa listed six reasons for considering the amendment ill-advised. Among those, he expressed concern that local agencies would not have ready access to specialists, such as lawyers, who could make a reliable differentiation between issues of law or policy and issues of fact or judgment. He also expressed concern that local determination would result in erroneous denials of continued assistance and in a lack of uniformity and objectivity in welfare administration. Costa asked that the Office of the Secretary be informed of the opposition of the Assistance Payments Administration to the proposed amendment. Letter from John L. Costa to John D. Twiname (Feb. 6, 1973) (on file with the *Minnesota Law Review*).

criteria established by the Social and Rehabilitation Service. Instead, states would be free to decide, without federal guidance, whether recipients were entitled to continued assistance pending their hearings. Under the proposed regulation states were afforded the discretion to deny fair hearings on questions of policy so long as there was an alternative procedure for communicating views concerning agency policy to state welfare officials.⁷⁴ Consistent with that change, the proposed rule omitted language in the regulation that required fair hearings to include consideration of the reasonableness and equitableness of agency policies.⁷⁵

Although the public response to the proposed regulation was overwhelmingly negative,⁷⁶ comments from state welfare

74. The proposed regulation would have provided:

An opportunity for a fair hearing before the State agency will be granted to any individual who requests a fair hearing because his claim for financial or medical assistance is denied, or is not acted upon with reasonable promptness, or because he is aggrieved by any other agency action affecting receipt, suspension, reduction, or termination of such assistance, and who raises an issue of fact or judgment relating to the individual case, including a question of whether the State agency rules or policies were correctly applied to the facts of the particular case. An opportunity for a fair hearing before the State agency will likewise be granted to an individual whose request raises only an issue of State agency policy, unless there is made available an alternative procedure whereby views concerning State agency policy can be communicated to officials of the State agency.

38 Fed. Reg. 9819, 9820 (1973).

75. The proposed language omitted the phrase in the then-existing regulation that entitled a recipient to a fair hearing if he was aggrieved "by agency policy as it affects his situation." Compare *id.* with 36 Fed. Reg. 3034 (1971) (codified at 45 C.F.R. § 205.10(a)(3) (1972)).

76. Almost 700 letters were received. See 38 Fed. Reg. 22,005 (1973) (preamble). Of the 255 responses that directed comments to the issuance as a whole, 15 letters favored the regulation, 233 were against it, and 7 were undecided. Assistance Payments Administration, U.S. Dep't of Health, Education, and Welfare, Summary of Replies Re: AO-IM-73-29, at 1 (undated) (on file with the *Minnesota Law Review*) [hereinafter cited as APA Summary]. The responses were summarized as follows:

The responses stressed the undue hardship to recipients, the fact that the proposed regulation violated the constitutional rights of applicants and recipients, and were punitive, restrictive, and regressive. They further pointed out that the proposed regulation increased administrative inefficiency and complicated the application process as well as sanctioned abuses by the agency.

Id. at 1.

Of the 96 letters that addressed the option of transferring fair hearing responsibilities to local agencies, 91 opposed the provision. The opponents to local hearings included all eight state and federal legislators who responded, both of the nonwelfare government officials, and all 27 legal aid groups who commented on the issue. The general consensus was that impartial decision-making at the local level was impossible. All five responses in favor of local hearings came from state or local welfare agencies. *Id.* at 2-4. A different sum-

agencies were generally favorable.⁷⁷ The regulation⁷⁸ was promulgated in the summer of 1973 largely without change⁷⁹ and remains in effect today.⁸⁰

The new regulation made one significant change in the procedure by which welfare agencies were to determine whether a case raised an issue of fact or judgment, a change that resulted from a three-judge district court decision. In *Yee-Litt v. Richardson*,⁸¹ a suit had been brought against the California state welfare department in the fall of 1971, just months after the effective date of the first federal hearing regulation.⁸² The plaintiffs sought declaratory and injunctive relief on the ground that state and federal regulations unconstitutionally permitted the state to deny continuation of assistance to recipients who had

many of the same comments to the proposed regulation reported that 17 state or local welfare agencies commented on the provision of local evidentiary hearings and that all but three of these favored allowing states this option. Summary of Comments, Attachment to Memorandum from Francis D. DeGeorge, Acting Administrator, Social and Rehabilitation Service, to Secretary [Caspar W. Weinberger], at 1 (June 14, 1973) (on file with the *Minnesota Law Review*) [hereinafter cited as DeGeorge Memorandum].

Of the 51 correspondents who stated an opinion on the optional use of a grievance procedure in lieu of hearings on issues of law or policy, three were in favor and 48 were opposed. Those in favor of the grievance procedure alternative believed that it would reduce unnecessary administrative costs. Those opposed considered the provision a violation of due process and expressed concern that it would cause undue hardship from loss of assistance pending the hearing decision and would eliminate the most effective way for recipients to challenge agency policy. Several commented on the difficulty of distinguishing questions of fact from questions of policy. APA Summary, *supra*, at 7, app. A5-1, A5-2.

77. DeGeorge Memorandum, *supra* note 76, at 1.

78. 38 Fed. Reg. 22,005 (1973). The preamble gives an incorrect citation to the proposed version of the regulations promulgated therein. The regulations promulgated at 38 Fed. Reg. 22,005 (1973) were proposed at 38 Fed. Reg. 9819 (1973). Steinman Letter, *supra* note 72.

79. As had been proposed, the new regulation gave states the option of providing hearings before the state agency or before a local hearing officer. 45 C.F.R. § 205.10 (1979). Consistent with the objective of giving states greater flexibility in administration, states were given the authority to determine, without federal guidelines, whether a recipient's hearing request raised an issue of fact or judgment, or solely a question of law or policy. *Id.* § 205.10(a) (6) (i) (A). Since local agencies could now provide fair hearings, they were also given authority to determine whether a case raised any issues entitling the recipient to continued assistance until the hearing was decided. *Id.* § 205.10(a) (1), .10(a) (6) (i) (A).

80. *Id.* § 205.10.

81. 353 F. Supp. 996 (N.D. Cal.), *aff'd mem. sub nom. Carleson v. Yee-Litt*, 412 U.S. 924 (1973).

82. The HEW secretary was also named as a defendant, but the court dismissed the action as to the federal defendant because the plaintiffs had not challenged the federal statute as unconstitutional under 28 U.S.C. § 2282 (1970) (repealed 1976). 353 F. Supp. at 1001 n.3.

sought appeals.⁸³

The plaintiffs offered three theories in support of their claim that this procedure was unconstitutional: (1) due process requires an opportunity for a pre-termination hearing in all cases, regardless of the issues raised by the appeal; (2) the requirement that welfare recipients articulate the basis of their appeals and demonstrate the existence of an issue of fact was an unfair burden that resulted in a deprivation of their right to a hearing; and (3) the fact-policy distinction was so vague and lacking in standards that decisionmaking was arbitrary and thus deprived recipients of a hearing in violation of their due process rights.⁸⁴

The court's opinion on the first issue, whether due process requires a pre-termination hearing in all cases, is not entirely clear. Although there is language indicating that the court agreed with the defendants on this issue,⁸⁵ other language sug-

83. Although "appeal" is generally used to describe the proceeding used by a superior court to review a judgment of a lower court, see BLACK'S LAW DICTIONARY 88-89 (5th ed. 1979), in welfare administration the term has traditionally been used to describe the initial administrative adjudicatory proceeding [the hearing] to review the bureaucratic determination of the recipient's eligibility or benefit level. See, e.g., 353 F. Supp. at 997-98. The latter use of the term will be followed throughout this Article.

84. 353 F. Supp. at 998.

85. The court cited three cases that it claimed stated "evidentiary hearings are needed only where factual contentions are raised." *Id.* Although it recognized that the decisions were not on point, the court stated that they supported the defendants' position that "no prior hearing is required by due process where no facts are in dispute." *Id.* In this respect, the court appears to have confused two distinct issues: (1) whether a prior hearing is required; and (2) the extent to which the procedures at such a hearing vary with the nature of the issue to be considered.

One of the cases cited by the court as holding that no prior hearing is required involved a state welfare agency's challenge to the procedures afforded to it prior to a threatened cut-off of federal funds. *Connecticut State Dep't of Pub. Welfare v. HEW*, 448 F.2d 209 (2d Cir. 1971). The state had, in fact, been granted a prior hearing, but it claimed that it should have had the opportunity to examine federal officials about the basis of their regulations. The court held that since there were no adjudicatory facts at issue, it was sufficient to have provided the state with an opportunity for oral argument on the legal questions at issue. *Id.* at 212.

The two other cases cited by the *Yee-Litt* court as support for the claim that no prior hearing is required by due process where no facts are in dispute were inapposite for another reason. Unlike the plaintiffs in *Yee-Litt*, the plaintiffs in these two cases were challenging not individual decisions affecting their benefits, but statewide changes in policy. *Russo v. Kirby*, 453 F.2d 548 (2d Cir. 1971); *Provost v. Betit*, 326 F. Supp. 920 (D. Vt. 1971). In *Russo*, plaintiffs were challenging the reversal of a policy that had allowed strikers to collect welfare benefits. In *Provost*, plaintiffs were challenging a newly adopted method for calculation of welfare benefits that affected every recipient in the state. In both cases, the hearing sought by the plaintiffs was more like a rulemaking proceeding than an adjudicatory proceeding.

gests that the court agreed with the plaintiffs.⁸⁶ The court found it unnecessary to decide the second issue, whether the California procedures placed an unconstitutional burden on welfare recipients to plead the existence of a factual issue, and resolved the case on the plaintiffs' third argument. The court held that the fact-policy distinction, as it was applied in California, resulted in the denial of aid to recipients who were constitutionally entitled to continued payments.⁸⁷ The court found that the state, "even when using its best effort with seemingly innovative regulations," could not avoid making many erroneous determinations.⁸⁸ According to the court, the fault did not lie with the state, but rather with the "unclear and unmanageable fact-policy distinction which the regulations have created."⁸⁹ The court therefore enjoined the state from withholding welfare assistance to persons who had made a timely request for a fair hearing.⁹⁰ California sought review in the United States Supreme Court, but the Court summarily affirmed.⁹¹

One might suppose that this decision would have put an end to the fact-policy distinction and that states thereafter would be directed to continue benefits in all cases until the appeal was decided. In fact, HEW chose to read the *Yee-Litt* decision as narrowly as possible in order to give states flexibility in designing hearing procedures. Rather than abandoning the fact-policy distinction entirely, HEW merely moved its application to a later stage in the proceedings. Under *Goldberg*, it was

86. Immediately following its statement that the "fact-policy distinction [was] not viable," the court cited, as a case with a similar conclusion, *Mothers' and Children's Rights Org. v. Sterrett*, 467 F.2d 797 (7th Cir. 1972). 353 F. Supp. at 1000. The *Sterrett* case held that welfare recipients are entitled to a hearing, prior to termination, to present legal arguments, even if no factual issues are raised. See 467 F.2d at 800-01. The *Sterrett* case also distinguished two of the three cases the *Yee-Litt* court cited to support defendants' arguments, see note 85 *supra*, on the ground that they had merely held that *evidentiary* hearings are not required on issues of law. *Id.* at 800 n.10.

87. 353 F. Supp. at 1000-01.

88. *Id.* at 1000.

89. *Id.* at 1001.

90. *Id.* One judge dissented in part. He apparently agreed with the majority's discussion of the issues, but would have denied broad injunctive relief. *Id.* (Hamlin, J., concurring and dissenting).

91. *Carleson v. Yee-Litt*, 412 U.S. 924 (1973). A summary affirmance applies to the judgment only and not necessarily to the court's reasoning. Such an affirmance prevents lower courts from reaching opposite conclusions on the precise issues presented. A summary affirmance should not be considered as breaking new ground, but rather as applying principles established by prior decisions to the particular facts involved. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

clear that, at least for cases involving a question of fact or judgment, benefits had to continue until the appeal had been decided.⁹² Read most narrowly, the decision in *Yee-Litt* merely prevented the state from terminating benefits prior to the hearing; it did not explicitly state that benefits must be continued until after the appeal was decided. HEW was therefore able to specify in the regulation following *Yee-Litt* that states continue benefits until a decision on the appeal is rendered after a hearing unless "[a] determination is made at the hearing that the sole issue is one of State or Federal law or policy, or change in State or Federal law and not one of incorrect grant computation."⁹³ The result is that states must continue benefits until the appeal is decided if there is an issue of fact or judgment; but if it is determined at the hearing that the only issue is a question of law or policy, the state may discontinue benefits immediately, even though no decision has yet been rendered on the issues raised by the appeal.

In addition to this response to the *Yee-Litt* decision, the new regulations differed from the proposed regulations in defining the circumstances in which the states were obligated to provide any hearing at all. In the preamble to the regulation, HEW acknowledged that most of the public responses indicated disagreement with the proposal that states be allowed to offer grievance procedures in lieu of hearings on questions of law or policy on the basis that the existing hearing procedure provided "a viable mechanism for effecting changes in policy."⁹⁴ The regulation as promulgated,⁹⁵ however, not only al-

92. *Goldberg* held that due process required "an adequate hearing before termination of welfare benefits," 397 U.S. at 261, and defined an adequate hearing to include a decision that states reasons and the evidence relied upon. *Id.* at 271.

93. 45 C.F.R. § 205.10(a)(6)(i)(A) (1979). States apparently retain the option to continue assistance in all cases regardless of the issue raised. This option was explicit in the prior regulation, but is implicit in the current regulation. The old regulation stated, "Alternatively, the State may provide for continuing assistance in all cases." 36 Fed. Reg. 3034 (1971) (codified at 45 C.F.R. § 205.10(a)(5)(iii)(b) (1972)). Under the current rule, quoted in the text accompanying this footnote, a state could continue assistance in all cases if it never made a determination at the hearing that the sole issue was one of law or policy. Letter from Stephanie W. Naidoff, HEW Regional Attorney, to Magistrate Richard A. Powers (Apr. 30, 1974); Exhibit A to Consent Decree, *Hackman v. Wohlgemuth*, No. 73-1652 (E.D. Pa. Nov. 19, 1974).

94. 38 Fed. Reg. 22,005, 22,006 (1973). For a more complete summary of the comments regarding this provision, see note 76 *supra* and accompanying text.

95. The regulation as promulgated allowed states to deny or dismiss a request for a hearing "where the sole issue is one of State or Federal law requiring automatic grant adjustments for classes of recipients." 38 Fed. Reg. 22,005, 22,008 (1973) (codified at 45 C.F.R. § 205.10(a)(5)(v) (1979)). If states choose to

lowed states to deny hearings to recipients who had been adversely affected by changes in the law, but also deleted the requirement of an alternative grievance procedure for bringing concerns to the attention of state officials.⁹⁶

In summary, the 1973 amendments made significant changes from the first hearing regulation that had been promulgated in 1971. Despite fears of partiality and an absence of adequate legal expertise, local hearing officers were permitted to decide appeals and to determine whether an appeal raised an issue of fact or judgment. Despite the well-documented difficulty in establishing clear federal definitions that would allow hearing officers accurately to distinguish questions of law or policy from issues of fact or judgment, hearing officers were allowed to make these distinctions without any federal guidelines and without any requirement that states establish their own uniform guidelines. Despite long-standing HEW policy that the interests of sound welfare administration were best served by ensuring that recipients could bring challenges to state policy to the attention of state officials,⁹⁷ states were not required to provide a hearing or any other grievance procedure

provide hearings on changes in law or policy, they may consolidate individual appeals into a single group hearing. 38 Fed. Reg. 22,005, 22,007-08 (1973) (codified at 45 C.F.R. § 205.10(a)(5)(iv)). Consistent with these changes, HEW deleted the language that had required states to consider the reasonableness and equity of agency policies at fair hearings. See note 75 *supra* and accompanying text.

96. The preamble's explanation for this complete reversal of long-standing HEW policy was a modest one. The preamble stated only, "The provision regarding a grievance system has been deleted since 'expression of views' on program policy is part of legislative and rulemaking procedures." 38 Fed. Reg. 22,005-06 (1973). The staff of the agency, in apparent error, explained to the Secretary that this amendment was a response to the *Yee-Litt* decision, a case that pertained only to the circumstances under which assistance was continued and not the circumstances under which a hearing had to be offered. A memorandum to the HEW Secretary seeking the Secretary's approval to promulgate the new hearing regulation explained the change in § 205.10(a)(5):

Section (5) has been rewritten to conform to the decision in *Yee-Litt v. Carleson*, et al, recently affirmed by the U. S. Supreme Court. After discussion with the attorney general who argued the case, it was determined that the State need not grant a hearing where a change in grant results from a statewide change required by the implementation of a change in State or Federal law. If the State wishes, it may provide a forum for grievances about such changes through group hearings.

DeGeorge Memorandum, *supra* note 76, at 2. The Secretary appears to have been misinformed about the reason for this change. It might have been more accurately explained as a delayed response to the decision of the federal district court in *Arizona v. Richardson*, No. Civ. 71-563 PHX-WCF (D. Ariz. June 16, 1972). See note 59 *supra*.

97. See notes 47, 64 *supra* and accompanying text.

for such challenges.⁹⁸

The 1973 regulation, which remains in effect today, was designed to allow states as much discretion in designing hearing policies as HEW's interpretation of the governing statutory and constitutional law allowed. This Article examines the correctness of HEW's assessment of the legality of its current regulation governing the provision for hearings on questions of law. Before turning to that question, however, it is appropriate to determine how the states currently exercise the discretion they have under the regulation to discontinue assistance before hearing decisions are rendered in appeals that raise no factual questions.

III. THE EXERCISE OF STATE DISCRETION TO IMPLEMENT HEW REGULATIONS ALLOWING STATES TO DISCONTINUE ASSISTANCE PRIOR TO A HEARING DECISION ON A QUESTION OF LAW

Under the federal regulation,⁹⁹ states are given a choice between two methods of handling the continuation of assistance pending a hearing on a recipient's appeal from a notice of intent by the welfare agency to reduce or terminate benefits. Under the first method, a state may continue assistance until a decision is rendered on the appeal regardless of the nature of the issues raised.¹⁰⁰ Alternatively, if the hearing officer determines that the sole issue is one of law or policy, a state may immediately implement the change in the welfare grant indicated by the agency's notice, even though a decision on the merits of the appeal has not yet been rendered.¹⁰¹ This section examines how states have exercised the discretion afforded them by the federal regulation. Do states choose the administratively easier but potentially more expensive method of continuing assistance in all cases? Or, do they attempt to make the difficult assessment in each case of whether the appeal raises

98. The justification offered for these changes was to allow states maximum flexibility in the administration of their welfare programs. *See* text accompanying notes 72-73 *supra*. The intent to provide states greater flexibility in welfare administration was stated to the Secretary as the reason for the new hearing regulation in a memorandum seeking the Secretary's approval to promulgate the regulation. DeGeorge Memorandum, *supra* note 76, at 4.

99. 45 C.F.R. § 205.10(a)(6)(i)(A) (1979).

100. *See Hackman v. Wohlgemuth*, No. 73-1652 (E.D. Pa. Nov. 19, 1974).

101. *See* note 93 *supra* and accompanying text.

no issues of fact or judgment and thereupon terminate or reduce benefits pending a hearing decision?

In an effort to determine the answers to these questions, a survey was conducted of state welfare administrators. Letters inquiring about the state's policy were sent in the spring of 1978 to state welfare department administrators of all fifty states and the District of Columbia.¹⁰² Thirty-three states indicated that their state policy allows the hearing officer to determine that the only issue is a question of law or policy and to terminate or reduce benefits if such a finding is made.¹⁰³ Under the actual practice of seven of these thirty-three states, however, benefits are rarely, if ever, changed until the full decision on the appeal is rendered.¹⁰⁴ In the remaining eighteen jurisdictions, no attempt is made at the hearing to decide whether the appeal raises only questions of law or policy, because benefits are continued in all cases.¹⁰⁵ Thus, the survey revealed that as many as two-thirds of the states have policies that permit the state welfare agency to terminate or reduce benefits of recipi-

102. After citing the governing federal regulation and briefly describing the choice that the state is given under it, the letter asked each administrator, "Does your state terminate AFDC payments to a recipient before a hearing decision where the only issue raised by the recipient's appeal is a question of law?" States were also asked to supply copies of any sections of state regulations or manuals in which this hearing policy was articulated. Forty-four states returned the questionnaire by mail. The remaining seven jurisdictions were contacted by telephone during the summer of 1978.

103. These states included Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, Wisconsin, and Wyoming. Although New York has a regulation providing for the termination of assistance if it is determined that there is no issue of fact or judgment, at the time of the survey New York was subject to an injunction that prevented it from utilizing that regulation. See *Viverito v. Smith*, 76 Civ. 4151 (MEL) (S.D.N.Y. Oct. 26, 1976). Since July 1979, however, New York has been able to implement its regulation. See *Viverito v. Smith*, 76 Civ. 4151 (MEL) (S.D.N.Y. July 6, 1979). The materials supplied by Arkansas and Montana suggest that these states might be violating the federal regulation by effecting a change in benefits prior to the hearing in cases in which there appear to be no issues of fact or judgment.

104. These states included Arizona, Maryland, Ohio, Utah, West Virginia, Wisconsin, and Wyoming. The information was volunteered in response to the survey. It is not known whether other states that have a policy of early discontinuation also fail to implement it.

105. These included Alabama, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Kentucky, Minnesota, Missouri, Nebraska, New Hampshire, Oklahoma, Oregon, Pennsylvania, Texas, Vermont, and Virginia. The Pennsylvania policy was adopted pursuant to a consent decree. See *Hackman v. Wohlgenuth*, No. 73-1652 (E.D. Pa. Nov. 19, 1974).

ents whose appeals question the validity of agency law or policy rather than the agency's judgment or assessment of facts.

In view of the recognized difficulty in making the fact-law distinction,¹⁰⁶ it is surprising that so many states apparently believe that they can accurately apply the distinction to determine whether to continue welfare benefits. It is also surprising that these states have not found it necessary to provide definitions or examples of the relevant categories in their state manuals or regulations to assist hearing officers in making that determination.¹⁰⁷

In the absence of guidance by the states, how do hearing officers decide whether the issues raised by recipient appeals are issues of fact or law? It may be that hearing officers make their determinations without the benefit of any formal definitions. Or, it may be that hearing officers use definitions supplied by HEW, not for the purpose of providing guidance in program administration, but rather for the purpose of obtaining data from the states on public assistance hearings. The Social Security Act requires that states must, as a condition for the receipt of federal funds for the AFDC program, "make such reports, in such form and containing such information, as the Secretary may from time to time require."¹⁰⁸ When the government compiles its annual report of Requests for Hearings in Public Assistance, it asks the states to supply information about hearings involving the federally-aided Medical Assistance¹⁰⁹ and AFDC programs,¹¹⁰ including data about the nature

106. See, e.g., Letter from Lee C. McClelland, Manager—Hearings Unit, Adult and Family Services Division, Oregon Department of Human Resources, to Professor Laura Cooper (Apr. 20, 1978) (on file with the *Minnesota Law Review*) ("Our experience led us to the conclusion that line staff had considerable difficulty [*sic*] making the distinction . . ."). See also note 49 *supra*.

107. Of the thirty-five states that supplied copies of state manuals or regulations, only Vermont had regulations that attempted to define the categories and provide examples for the benefit of hearing officers. 1 VT. REG. HUMAN SERVICES § 1251 (Vt. Dep't Soc. Welfare 1976). Vermont continues benefits pending appeal in all cases, but if the agency's position is upheld after a hearing concerning only an issue of law or policy, the agency attempts to recoup any benefits continued solely as a result of the recipient's appeal. *Id.* at § 1253.

108. 42 U.S.C. § 602(a) (6) (1976).

109. Medical Assistance, a program financed by state and federal funds, pays for medical care for certain needy families and individuals. 42 U.S.C. §§ 1396-1396(j) (1976) (amended 42 U.S.C.A. §§ 1396-1396k (West Supp. 1980)).

110. See OFFICE OF RESEARCH AND STATISTICS, OFFICE OF POLICY, SOCIAL SECURITY ADMINISTRATION, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, REQUESTS FOR HEARINGS IN PUBLIC ASSISTANCE, FISCAL YEAR 1977, at 1 (Oct. 1979) [hereinafter cited as 1979 STATISTICAL REPORT]. During this reporting period, on a national basis, about 80% of the hearing requests arose from the AFDC program and 20% from the Medical Assistance Program. *Id.* at 8 (Table 2).

of the issues for which appeals are requested. The states divide their appeal requests into three categories: protest of agency policy, challenge of law or agency policy, and protest of agency facts or judgment.¹¹¹ Although HEW supplies definitions of these categories in the instructions for completing the report form,¹¹² an enormous amount of ambiguity remains. What is the difference between a challenge to agency policy and a protest of agency law or policy? Can an appeal challenge policy or protest law? How is the state to distinguish between a protest of an agency judgment and a challenge of state law? How is the state to categorize a case in which there are no disputed issues of fact, but the recipient is asking the agency to determine the correct state policy to apply to cases with similar factual circumstances?

Given these ambiguous definitions, one might expect that the states have considerable difficulty in accurately and consistently supplying the data requested by HEW. The information supplied by the states and reported by HEW tends to confirm that expectation. In the report on requests for hearings

During the reporting period, the regulations that governed hearings in the AFDC program also applied to the Medical Assistance Program. See 45 C.F.R. § 205.10(a) (1977).

111. 1979 STATISTICAL REPORT, *supra* note 110, at 12 (Table 6). HEW stated that the reason it asks states to use these categories is the federal regulation that prevents states from suspending assistance pending a hearing decision unless a determination is made at the hearing that the "sole issue is one of State or Federal law or policy, or change in State or Federal law." Letter from Anne Henneman, Family Assistance Studies Staff, Office of Research and Statistics, Social Security Administration to Professor Laura Cooper (May 24, 1978) (on file with the *Minnesota Law Review*). The federal regulation is 45 C.F.R. § 205.10(a) (6) (i) (A) (1979).

112. 8. *Nature of request*—Enter the number of requests according to the nature of the request, i.e., whether the claimant's request protested the agency's action on the basis of agency policy and the facts or judgments related to his case; or protested the agency's policy that led to the agency's action in his case and in all other cases of individuals in similar circumstances.

- a. *Protest of agency policy*—Enter the number of requests concerned with actions and policies of the agency that affect not only the claimant's situation, but other persons in similar circumstances; include here situations in which the claimant agreed that the agency's policy was correctly applied in his case but requested a hearing to protest the agency policy itself.
- b. *Challenge of law or agency policy*—Enter the number of requests in which the claimant has challenged either Federal or State law.
- c. *Protest of agency facts or judgment*—Enter the number of requests that concerned an agency action(s) that affected the claimant's situation only and which protest the agency's action on the basis of facts or judgments in his case.

Social and Rehabilitation Service, U.S. Dep't of Health, Education, and Welfare, Action Transmittal, SRS-AT-76-173 (NCSS) 5-6 (Dec. 2, 1976).

in public assistance covering the period from October 1, 1976 to September 30, 1977, the government reported that 20% of hearing requests nationwide were protests of agency policy, 8.1% were challenges of law or agency policy, and 71.9% were protests of agency facts or judgment.¹¹³ These national totals obscure the wide disparities in the data reported by individual states. Two jurisdictions reported that more than ninety percent of their appeals were protests of agency policy¹¹⁴ and eight jurisdictions reported that more than ninety percent of their appeals were protests of agency facts or judgment.¹¹⁵ If it can be assumed that there are not, in fact, such broad differences in the hearings caseload among the states, the disparity in the states' reports suggest that the states cannot make accurate determinations of the nature of welfare appeal requests, at least with the categories and definitions currently supplied by HEW.¹¹⁶ Doubts about the accuracy of state determinations

113. 1979 STATISTICAL REPORT, *supra* note 110, at 12 (Table 6). For the period from January to June 1976, 29.6% were protests of agency policy, 5.1% were challenges of law or agency policy, and 65.3% were protests of agency facts or judgment. NATIONAL CENTER FOR SOCIAL STATISTICS, OFFICE OF INFORMATION SYSTEMS, SOCIAL AND REHABILITATION SERVICE, U.S. DEPT OF HEALTH, EDUCATION, AND WELFARE, HEARINGS IN PUBLIC ASSISTANCE, JANUARY-JUNE 1976, at 16 (Table 11) (1977) [hereinafter cited as 1977 STATISTICAL REPORT].

114. 1979 STATISTICAL REPORT, *supra* note 110, at 12 (Table 6). In the previous report, three jurisdictions had reported that more than 90% of their appeals were protests of agency policy. 1977 STATISTICAL REPORT, *supra* note 113, at 16 (Table 11). At that time, two of these three states placed more than 99% of their appeals in the category of protest of agency policy. *Id.*

115. 1979 STATISTICAL REPORT, *supra* note 110, at 12 (Table 6). In the previous report, nine states reported that more than 90% of their appeals were protests of agency facts or judgment. 1977 STATISTICAL REPORT, *supra* note 113, at 16 (Table 11). At that time, five of these nine jurisdictions reported that cases in this category exceeded 99% of their caseload. *Id.*

116. It is possible that there is little relationship between the hearing issue categorization process used for statistical reporting purposes and the decisions by hearing officers who categorize issues in order to determine whether benefits are to be continued. For example, it could be that in a particular state, the hearing officers make categorization determinations with the benefit of expertise and the exercise of extreme care, while the categorization for statistical reporting purposes is done by an inexperienced clerk with little motivation to make accurate determinations. It is unlikely, however, for states to have two separate employees reviewing all of the welfare appeals files to make determinations of the nature of the issues raised by the appeals. It is more likely that, at least in those states that purport to use the issue determination as a basis for discontinuation of benefits, it is the hearing officer's determination that is also used for statistical reporting purposes. If that is true, in comparing the list of states in which the hearing officers make issue determinations, *see* notes 103-104 *supra*, with those reporting more than ninety percent of their hearings in a single issue category, *see* notes 114-115 *supra*, it appears that the statistical report may be evidence that hearing officers are not making accurate issue determinations.

are also raised by evidence that some states use no definitions for categorizing their caseload,¹¹⁷ and that in other states, where cases are categorized by several different people, there may be significant differences in the interpretations of HEW categories by those who supply data for the state report.¹¹⁸

In summary, available evidence demonstrates that (1) a substantial number of states attempt to categorize cases according to the nature of the issue raised in order to discontinue assistance pending an appeal decision, and (2) the likelihood of error in making that determination, even if not made until the hearing, is substantial.

IV. AN ASSESSMENT OF THE STATUTORY VALIDITY OF FEDERAL REGULATIONS PERMITTING DISCONTINUATION OF WELFARE ASSISTANCE PRIOR TO THE HEARING DECISION IN CASES RAISING QUESTIONS OF LAW

This section assesses whether discontinuation of assistance prior to a hearing decision in cases raising only legal issues, a procedure authorized by the federal regulation and currently practiced by many states, is permissible under the federal statutory provisions governing the administration of the AFDC program. As an initial matter, it is necessary to isolate for examination the regulation that permits the discontinuation of assistance from a related regulation that permits the denial of hearings. Current federal regulations governing welfare hearings invite the states to distinguish appeals raising questions of law from other types of cases for two distinct purposes—the denial of hearings and the discontinuation of benefits. First, a hearing need not be granted at all “when either State or Federal law requires automatic grant adjustments for classes of recipients unless the reason for an individual ap-

117. In Minnesota, the person who types the hearing officers' decisions is responsible for compiling the data on the nature of the appeal issue for the HEW report. She has not been supplied with any written definitions for the categories. Interview with Mari Konesky, Appeals Section, Minnesota Department of Public Welfare, in Minneapolis, Minnesota (May 22, 1978). Cf. note 107 *supra* (lack of guidance in regulations for hearing officers).

118. An inquiry from the author led Massachusetts to survey how its welfare referees categorize cases. It discovered that there were disparities in the interpretations given the HEW categories by different referees. The referees were inconsistent in their categorization of cases that called for interpretation of regulations. Letter from Susan G. Bartholomew, Director, Division of Hearings, Department of Public Welfare, Commonwealth of Massachusetts, to Professor Laura Cooper (July 31, 1978) (on file with the *Minnesota Law Review*).

peal is incorrect grant computation."¹¹⁹ States are therefore granted the specific authority to deny or dismiss a request for a hearing if such an automatic grant adjustment is the sole issue raised by the appeal.¹²⁰ Second, if a recipient makes a timely request for a hearing, welfare benefits must be continued until a decision is rendered after a hearing unless a determination is made at the hearing "that the sole issue is one of State or Federal law or policy, or change in State or Federal law and not one of incorrect grant computation."¹²¹

The relationship between these two provisions is not readily apparent. Do the regulations require that, if an appeal is requested following an automatic grant adjustment, benefits must be continued at least until an official determines at a hearing whether the validity of such an adjustment is the only issue raised by the appeal? HEW would say "no." Under HEW's interpretation of its own regulation, if the recipient is notified that benefits are to be affected by an automatic grant adjustment, the change may be implemented ten days from the date of notice.¹²² Benefits are continued until the hearing only if the recipient alleges that her payment was incorrectly computed. If the hearing officer subsequently determines that the recipient was not actually contesting computation, but only challenging the validity of the automatic grant adjustment, the hearing officer may both dismiss the hearing and discontinue benefits.¹²³

Unlike recipients affected by automatic grant adjustments for classes of recipients, recipients who raise questions of law that do not arise out of automatic grant adjustments are always entitled to a hearing and to maintenance of their benefits until the time of the hearing. In this latter category of cases, benefits may be immediately discontinued at the time of the hearing,¹²⁴ even though the recipient continues to be entitled to a decision on the merits of the claim. If the hearing officer's ultimate deci-

119. 45 C.F.R. § 205.10(a)(5) (1979).

120. *Id.* § 205.10(a)(5)(v).

121. *Id.* § 205.10(a)(6)(i)(A).

122. Commissioner, Assistance Payments Administration, Social and Rehabilitative Service, U.S. Dep't of Health, Education, and Welfare, Policy Information Memo No. 24 (Feb. 27, 1974). The ten-day notice provision is contained in 45 C.F.R. §§ 205.10(a)(4)(i)(A), (iii) (1979).

123. A recent decision of a federal district court, however, disagreed with HEW's view and permanently enjoined the state of Florida from affecting recipients' benefits by automatic grant adjustments until it was determined at the hearing that the only issue involved a change in state or federal law. *Curtis v. Page*, No. TCA 78-732 (N.D. Fla. Apr. 13, 1978).

124. 45 C.F.R. § 205.10(a)(6)(i)(A) (1979).

sion on the merits is favorable to the recipient, the recipient's benefits will be reinstated and corrective payments will be made retroactively.¹²⁵

The peculiar regulation that requires a decision on the merits and yet permits the discontinuation of assistance midway through the appeals process is the result of an amalgamation of HEW's policy that welfare benefits should not be continued pending an appeal unless the case raises issues of fact or judgment¹²⁶ and the determination of the federal courts that the distinction between questions of fact or judgment and issues of law or policy is not likely to be accurate if it is made administratively, prior to the welfare hearing.¹²⁷ From the beginning, HEW's requirement that benefits continue pending an appeal has been mandatory only in cases in which the recipient's appeal raises an issue of fact or judgment.¹²⁸ HEW, therefore, must have believed that the reasons for continuing benefits did not apply to cases in which only issues of law or policy were involved. What are the reasons for continuing welfare benefits, despite an administrative determination of ineligibility, until a decision is rendered after a hearing?

The rationale for such a policy is the same one that the Supreme Court used to support its holding in *Goldberg v. Kelly*,¹²⁹ that due process requires a pre-termination hearing, since without it, an eligible recipient may be improperly deprived of essential food, clothing, and shelter. There is, in other words, both skepticism about the accuracy of administrative determinations of ineligibility and a belief that the hearing procedure is an effective mechanism for correcting administrative error. HEW's decision not to require a hearing prior to benefit termination in cases involving only issues of law and policy must therefore rest on an assumption that there is a significantly higher degree of accuracy for administrative determinations based on law and policy than for determinations based on fact, or that even if errors of law are frequent, the hearing mechanism is not an appropriate means of correcting them. It is unlikely that HEW believes that hearings are inappropriate to resolve issues of law or policy, because it has mandated that

125. *Id.* § 205.10(a)(18).

126. 38 Fed. Reg. 22,005, 22,006 (1973).

127. See notes 81-91 *supra* and accompanying text.

128. The first public expression by HEW of a policy that benefits should be continued until the appeal was decided limited such continuation to cases "involving an issue of fact, or of judgment relating to the individual case." 33 Fed. Reg. 17,853, 17,854 (1968).

129. 397 U.S. 254 (1970).

states provide hearings for such cases. The rationale for restricting prior hearings to cases in which law or policy are not solely at issue must therefore be the assumption that errors of law are less frequent than errors of fact or judgment.

The validity of the assumption that administrative errors of law are less frequent than errors of fact is central to the determination of whether the regulation is consistent with provisions of the Social Security Act. Part VI of this Article reports the results of an empirical study of welfare hearings which suggests that welfare agencies are as likely to make erroneous decisions on questions of law as they are on questions of fact.¹³⁰ Furthermore, the regulation causes potential problems with at least one or the other of two relevant provisions of the Social Security Act. Even if HEW is correct that errors of law are relatively infrequent, nevertheless allowing questions of law to be distinguished from questions of fact by a hearing officer who is not supplied with guidance for making the distinction may violate the statutory requirement that programs be uniformly administered throughout a state. If HEW is incorrect and errors of law are as common as errors of fact, HEW may have a statutory obligation to continue benefits in cases raising issues of law, as well as in cases raising issues of fact, until the appeal has been decided on the merits. This obligation would arise from the mandate that aid be furnished to all eligible individuals.

A. THE STATEWIDENESS REQUIREMENT

For the purpose of assessing the validity of the regulation under the statutory statewideness requirement, it will be assumed that HEW is correct in assuming that legal errors are less frequent than factual errors. If the line between insignificant and significant error rates is the line between cases of law or policy and all other types of cases, HEW must write a regulation that allows the states, with relative accuracy, to draw the line between the two categories of cases in order to effectuate a policy of limiting the continuation of benefits to cases in which there is a significant likelihood of error. The history of HEW's efforts to establish clear definitions and the history of states' attempts to apply the fact-law distinction to actual appeals overwhelmingly demonstrate that the distinction is neither easily defined nor easily applied. After years of struggling with alter-

130. See notes 217-263 *infra* and accompanying text.

native definitions of categories,¹³¹ HEW abandoned the effort in 1973¹³² so that today literally hundreds of state and local hearing officers are free to make the determination without guidance from either HEW or the state agencies.¹³³ The result is a lack of consistency in the circumstances under which welfare benefits are continued, both between and within states.¹³⁴

The vesting of discretion in state and local hearing officers to identify the presence of issues of law without federal guidelines or a requirement that states articulate their own guidelines may violate those provisions of the Social Security Act requiring that the AFDC program in each state be administered uniformly throughout the state.¹³⁵ Statewide uniformity was mandated to alleviate problems that were evident when, prior to the 1935 Social Security Act, public assistance was largely financed and administered by localities. The enormous discretion vested in local officials resulted in serious inequities in the treatment of families in similar circumstances.¹³⁶

HEW has implemented the congressional desire for statewide uniformity through a regulation which requires that state programs operate "on a statewide basis in accordance with equitable standards for assistance and administration that are

131. See, e.g., notes 66-67, 87-90 *supra* and accompanying text.

132. See text accompanying notes 72-74 *supra*. The *Fair Hearing Guides*, *supra* note 57, which contained the definitions of categories, was revoked in its entirety in 1974. Commissioner, Assistance Payments Administration, Social and Rehabilitation Service, U.S. Dep't of Health, Education, and Welfare, Program Instruction APA-PI-75-5 (Aug. 27, 1974).

133. See notes 103-104, 107 *supra* and accompanying text.

134. One might wonder whether the problem of accurate categorization at the hearing could be entirely resolved by the provision of detailed definitions of the categories of issues raised by welfare appeals. A list of detailed category definitions was prepared for use in the study of welfare appeals from which data is reported later in this Article. See Appendix, *infra* p. 1178. In the course of the study, that list of category definitions could be used successfully to identify issues in welfare appeals when applied to files that included the hearing officer's decision. Usually the hearing officer's decision was the only document in the file that would assist in issue identification. Hearing officers' decisions are only prepared following the hearing and subsequent to an opportunity to consult legal references and carefully consider the issues in the process of writing a decision. It is far less likely that a list of detailed category definitions would yield comparably accurate categorizations of issues raised by appeals if it were applied only to the information available at the time of the hearing.

135. The Act requires that state AFDC programs must be "in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them." 42 U.S.C. § 602(a)(1) (1976). The Act further requires that the states either designate a single state agency to administer the program or provide for a single state agency to supervise the program's administration. *Id.* § 602(a)(3).

136. See authorities cited in *Boddie v. Wyman*, 434 F.2d 1207, 1210 (2d Cir. 1970), *aff'd mem.* 402 U.S. 991 (1971).

mandatory throughout the State."¹³⁷ HEW has traditionally interpreted the statutory and regulatory statewideness requirements to give it authority to prevent states from vesting decisionmaking authority in local officials without the provision of state standards, reasoning that such discretion, without clearly articulated standards for its exercise, would result in unequal treatment within a state. For example, in recent years HEW has asserted that a provision of the Minnesota state AFDC plan allowing counties to waive the amount of equity that a recipient has in a home above the amount normally allowed violates the federal statewideness requirement because it vests authority in the counties without adequate criteria for the granting of waivers.¹³⁸

The statutory mandate of statewideness, viewed in the context of the HEW interpretation that statewideness requirements preclude the vesting of discretion without standards, may be violated by the practice under current federal regulations that allows hearing officers to make the determination of whether a case raises an issue of law, as opposed to an issue of fact, in the absence of state or federal definitions of those categories of issues. Efforts by hearing officers to make such a diffi-

137. 45 C.F.R. § 205.120(a)(1) (1979).

138. Until recently, Minnesota provided an explicit monetary limit for the amount of equity that a recipient could have in a home and still maintain AFDC eligibility, but it also sought to allow counties to waive excess equity in individual cases. HEW objected to the granting of waiver authority to counties without the provision of any standards, although it did not object to excess equity waivers *per se*. In response to the concerns expressed by HEW, the Minnesota statute was amended to read that "real estate used as a home in excess of [the specified] amount will not be a bar to eligibility where the county welfare board determines that such real estate is not available for support of the family or the sale of such real estate would cause undue hardship." Act of June 8, 1977, ch. 448, § 5, 1977 Minn. Laws 1315 (codified at MINN. STAT. § 256.73(a)(1) (1978)). Despite these guidelines, the federal agency still maintained that the equity waiver provisions in Minnesota violated the statewideness requirement. Letter from Barbara T. Stromer, Assistant Commissioner, Support Services Bureau, Minnesota Department of Public Welfare, to Professor Laura Cooper (Oct. 2, 1979) (on file with the *Minnesota Law Review*). See also Letter from Paul E. Webb, Regional Commissioner, Social Security Administration, Region V, to Professor Laura Cooper (Oct. 18, 1979) (on file with the *Minnesota Law Review*). The Minnesota limitation on equity in homesteads was recently eliminated. Act of April 24, 1980, ch. 614, § 130, 1980 Minn. Laws (amending MINN. STAT. § 256.73 (1978)). The Minnesota Department of Public Welfare favored the statutory amendment to place no limitation on the equity that a person could have in a home while retaining welfare eligibility. In the view of the state Income Maintenance Bureau, the continuing dispute with the federal government regarding conformity with the statewideness requirement was a significant reason for elimination of the equity limit. Telephone conversation with Mr. Kevin Kenney, Director of Policy Analysis and Planning, Minnesota Department of Public Welfare (May 30, 1980).

cult decision without any guidelines undoubtedly result in disparate treatment within a state of recipients raising identical issues in their appeals. Since the HEW regulation that grants discretion for predecision discontinuation of assistance must inevitably produce inconsistent administration within states, the federal regulation appears to violate the statewideness requirement of the Social Security Act.

B. STATUTORY MANDATE FOR THE ACCURATE PAYMENT OF BENEFITS

The regulation authorizing predecision discontinuation of assistance for welfare recipients seeking administrative review of questions of law may violate the Social Security Act in another respect. If HEW is incorrect in its assumption that bureaucratic errors of law are less frequent than errors of fact, the regulation may run afoul of a recent Supreme Court decision holding that the statutory mandate of accurate payment of governmental benefits may require continuation of benefits until a hearing decision if, in the absence of a prior hearing, there is an undue risk of erroneous deprivation. The empirical evidence presented in Part VI of this Article suggests that, in the AFDC program, agency errors on questions of law are as common as errors of fact or judgment.¹³⁹ If that is true, the Social Security Act provision requiring that AFDC benefits be paid with reasonable promptness to all eligible individuals¹⁴⁰ may mandate that, before any AFDC benefits are terminated, the welfare agency provide the affected recipients with a decision rendered by an impartial person after a hearing, whether the issue raised is one of law or fact.

The notion that a right to prior hearings may be inferred from a statutory requirement of accurate payment of benefits was first suggested in *Califano v. Yamasaki*.¹⁴¹ In that case, the issue was whether the government could recoup Social Security overpayments by decreasing future payments, without first providing the recipients an opportunity to demonstrate at an oral hearing that they are entitled to have the overpayment waived. The Social Security Act's waiver provision mandates that "there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this

139. See notes 242-243 *infra* and accompanying text.

140. 42 U.S.C. § 602(a)(4) (1976).

141. 442 U.S. 682 (1979).

subchapter or would be against equity and good conscience."¹⁴²

In the two cases consolidated in *Yamasaki*, the plaintiffs alleged that the commencement of recoupment without prior opportunity to demonstrate an entitlement to waiver violated the Social Security Act and the due process clause. The Ninth Circuit Court of Appeals affirmed the district court decisions without specifically addressing the statutory claims, holding that the prehearing recoupment procedures were unconstitutional.¹⁴³ The Supreme Court found it unnecessary to reach the due process issue,¹⁴⁴ stating that it was "willing to assume a congressional solicitude for fair procedure, absent explicit statutory language to the contrary."¹⁴⁵

The language of the waiver provision quoted above seems to have no direct bearing on the nature of the procedures required for determining waiver eligibility. The Supreme Court has nevertheless construed the statute as mandating a pre-recoupment oral hearing for any recipient who requests an overpayment waiver, asserting that accuracy is mandated by the statutory provision that "there shall be no" recovery when waiver is proper. The Court suggested that the existence of a statutory mandate to make accurate determinations of eligibility could be ascertained merely by examining whether the statutory language directing the administrative agency to make an eligibility decision was mandatory rather than permissive.¹⁴⁶ Congress, however, was very likely unaware that its choice between the words "shall" or "may" in sections of the statute not dealing with administrative procedures would determine whether program beneficiaries would be afforded hearings prior to benefit termination or reduction. *Yamasaki* allows decisions on important questions of administrative procedure to turn on the presence or absence of magical words, wholly di-

142. 42 U.S.C. § 404(b) (1976). Recoupment is considered to be without fault if the recipient neither knew nor should have known that the overpayment or the information on which it was based was incorrect. See 20 C.F.R. § 404.507(a) (1979). Recoupment is considered to defeat the purpose of the program if it would "deprive a person of income required for ordinary and necessary living expenses." *Id.* § 404.508. Recoupment is against equity and good conscience if the recipient has relied to his financial detriment upon the incorrect payment. See *id.* § 404.509.

143. The district court and court of appeals decisions for each of the cases were consolidated in *Yamasaki*. See 442 U.S. at 687-92.

144. The Court relied on the familiar doctrine that unnecessary constitutional decisionmaking should be avoided when a statutory dispute can be resolved irrespective of the constitutional question. *Id.* at 692-93.

145. *Id.* at 693.

146. *Id.* at 692-94 & n.9.

vored from considerations of actual legislative intent or the demands of fairness in the particular administrative context.

Once the presence of mandatory statutory language is found, satisfying the first part of the *Yamasaki* test, the inquiry turns to the type of procedures required to ensure reasonably accurate determinations by the administrative agency. To assess the accuracy of waiver decisions made in the absence of prior hearings, the Court examined the rate of reversal following waiver hearings conducted by the Social Security Administration in response to the district court injunctions issued in the consolidated cases. In 1977, there were approximately 2000 waiver cases in which recipients were afforded a short personal conference with an impartial agency employee and an opportunity to present testimony, offer evidence, and cross-examine witnesses. In thirty percent of these cases, the agency's initial decision against waiver was reversed.¹⁴⁷ Concluding that the agency might misjudge cases that could have been assessed properly at a hearing, the Court held that the statutory requirement to make accurate waiver decisions could only be satisfied by the provision of a pre-recoupment hearing to any recipient who requests a waiver.¹⁴⁸

In determining that pre-recoupment hearings were statutorily mandated for recipients who request waivers, the Court distinguished such cases from those in which recipients dispute only whether an overpayment occurred. The court stated that overpayment cases in which there are no allegations of entitlement to waiver involve "relatively straightforward matters of computation for which written review is ordinarily an adequate means to correct prior mistakes."¹⁴⁹ Under the Court's analysis, even if a statute requires a proper determination of entitlement to benefits, the procedures afforded need not ensure absolute accuracy in every case, but must allow "some leeway for practical administration."¹⁵⁰ The Court assumed that resolution of overpayment issues generally does not involve a determination of credibility and therefore concluded that an office review of beneficiaries' written submissions would be adequate to resolve most overpayment disputes.¹⁵¹

147. *Id.* at 697.

148. *Id.*

149. *Id.* at 696.

150. *Id.*

151. *Id.* Although elsewhere in its opinion the Court suggested that the risk of erroneous deprivation is properly measured by empirical evidence, *id.* at 697, the Court here failed to require evidence of whether decisions on overpayment issues would have a reversal rate comparable to that of waiver cases in hear-

In summary, *Yamasaki* has created a new test for assessing the fairness of administrative hearing procedures that may be used to supplant the traditional due process analysis of entitlement to prior hearings. The test's focus on risk of erroneous deprivation is essentially the same analysis the Court has used to resolve due process challenges to hearing procedures.¹⁵² The switch from constitutional to statutory analysis appears intended to allow the Court greater flexibility in choosing when to invalidate administrative procedures. By allowing its assessment of procedural fairness to depend, in part, on judicial interpretation of unrevealing legislative language, the Court can make ad hoc assessments which it need not follow in subsequent cases presenting analogous facts.

From the view of a critic of the Court, *Yamasaki* is an invitation to arbitrary judicial decisionmaking, free from the constraints of stare decisis. For potential plaintiffs, however, *Yamasaki* is an invitation to pose constitutional claims as statutory arguments in the hope that courts, once freed from the constraints of constitutional decisionmaking, will be more willing to require additional administrative procedures. For example, in assessing the validity of the HEW regulation that permits state welfare agencies to terminate AFDC benefits prior to a hearing decision if the case raises no factual issues, the statutory approach of *Yamasaki* may be used as an alternative to due process analysis. To apply this new analysis to the AFDC issue, one must examine both the language of the Social Security Act that governs the AFDC program, and the reversal rate in hearings on questions of law.

No provision of the Social Security Act explicitly requires that AFDC benefits be maintained, despite an initial agency determination of ineligibility, until a decision has been rendered after a hearing. There is, however, a provision in the Act that may be viewed as a statutory mandate to make accurate payments of AFDC benefits. Section 402(a)(10) of the Social Security Act provides that AFDC "aid . . . shall . . . be furnished

ings afforded subsequent to the review of the written file. The Court assumed that the test of whether a prior hearing may significantly improve the accuracy of the decisionmaking process is simply whether credibility disputes are present. Although such an assumption may prove correct in the context of Social Security overpayment decisions, once the Court has established an empirical test as the basis to assess a risk of erroneous deprivation, it was inappropriate to settle for an assumption about the degree of risk in a particular category of cases.

152. See notes 159-216 *infra* and accompanying text.

with reasonable promptness to all eligible individuals.”¹⁵³ The “shall be furnished” language in this statute is of the same mandatory nature as the “shall be no recovery” language that appears in the Social Security program’s statute.¹⁵⁴ The AFDC statute thus appears to satisfy the first part of the *Yamasaki* test and would therefore require welfare agencies to make reasonably accurate determinations of eligibility.

The Supreme Court in *Yamasaki* considered the appropriate test of whether office reviews achieve reasonable accuracy to be whether hearings subsequent to such reviews often resulted in reversal of the initial decision, concluding that a reversal rate of 30% was sufficient to require a prior hearing. A study conducted of Minnesota AFDC hearings found that the reversal rate following hearings on questions of law was 61.7%.¹⁵⁵ This high rate of reversal suggests that the Social Security Act provision requiring the payment of assistance to all eligible individuals requires that AFDC benefits be continued until after a hearing decision, even when the only issue raised by the recipient’s appeal is a question of law.

153. 42 U.S.C. § 602(a)(10) (1976).

154. One possible issue that arises is whether the allowance for furnishing assistance “with reasonable promptness” would mean that, even if hearings would significantly improve administrative accuracy, the statute would permit an interruption of assistance during the time the appeal is pending for decision before a hearing officer. The argument would be that even if assistance were interrupted pending a hearing, if the aid were resumed following a decision by the hearing officer, it would still be furnished with *reasonable* promptness. The term “reasonable promptness” has been defined by HEW in the context of describing the time limits within which the state welfare agencies must act on new applications for assistance. In the federal regulations governing the AFDC program, HEW provides that decisions are made with reasonable promptness if they are made within 45 days. 45 C.F.R. § 206.10(a)(3)(i) (1979). What may be reasonable for decisions on new applications, however, may not be reasonable for those who are already dependent on public assistance. Is it reasonable to interrupt funds that, by definition, satisfy basic needs of a family that is deprived by the absence, unemployment, or incapacity of a parent? The plight of the welfare recipient in such a situation was well described by Justice Brennan in *Goldberg*:

Termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

397 U.S. at 264 (emphasis in original). In view of the effect upon such a family of any termination of benefits, it does not appear reasonable to interrupt that assistance for even a 45-day period. The statutory allowance for “reasonable promptness” thus does not detract from the otherwise mandatory language of § 602(a)(10).

155. See Table II at p. 1168 *infra*.

One possible flaw in this argument arises from the distinction made in *Yamasaki* that prior hearings are necessary in waiver determinations because credibility might be at issue, but are not necessary in cases challenging an agency's determination that an overpayment had occurred.¹⁵⁶ Since welfare hearings on questions of law do not involve issues of credibility, prior hearings would not be required for AFDC cases raising issues of law if credibility were indeed the distinctive factor. The Court's use of credibility as a distinguishing factor in *Yamasaki*, however, was based on an assumption, unsupported by any evidence, that written reviews are adequate to ensure accuracy in the absence of credibility issues. If the available empirical evidence shows, as it appears to, that in a significant number of AFDC cases the agency has misjudged the applicable law, and that the hearing process can correct those errors, the absence of credibility issues should not determine the prior hearing issue. It may be that welfare agencies are capable of developing procedures to improve the accuracy of legal determinations significantly on the bureaucratic level. For example, advance review of grant terminations or reductions by a staff attorney or an independent recipient advocate might be as successful as hearings in correcting legal errors made by agency employees. If so, the *Yamasaki* approach would not require hearings in this category of cases. In the absence of administrative procedures that could be as successful as hearings in ferreting out errors of law, however, welfare recipients should be entitled to hearings on questions of law prior to the termination or reduction of their AFDC benefits.

Part IV of this Article has considered two possible bases for challenging, on statutory grounds, the validity of federal regulations that permit states to discontinue AFDC assistance prior to a hearing decision when the only issue raised by the recipient's appeal is a question of law. Section A suggested that the statutory statewideness requirement may preclude hearing officers from making distinctions between cases on the basis of the issue raised by the appeal in the absence of adequate guidelines for defining issues.¹⁵⁷ Section B suggested that the statutory requirement for the payment of benefits to all eligible individuals may mandate prior hearings to ensure reasonably accurate agency determinations of eligibility.¹⁵⁸

156. See notes 149-151 *supra* and accompanying text.

157. See notes 131-138 *supra* and accompanying text.

158. See notes 139-155 *supra* and accompanying text.

Neither statutory base, however, adequately addresses the legality of discontinuing benefits when the recipient raises no factual issues. The first argument only questions the manner in which cases are distinguished by issue, and does not address the more fundamental question whether it is permissible to make a distinction at all. The second argument rests entirely on *Yamasaki*, a case that represents an injudicious attempt to avoid constitutional issues that should be directly addressed. Parts V and VI of this Article, therefore, consider whether the due process clause of the Constitution permits termination of welfare benefits prior to a hearing decision in cases raising only issues of law.

V. THE CONSTITUTIONAL STANDARD FOR PRIOR HEARINGS

Current federal regulations permit states to terminate AFDC benefits prior to a decision on an appeal when the only issue raised is a question of law.¹⁵⁹ Previous sections of this Article examined the history of this regulation, its use by the states, and its statutory validity. This section describes the analytical framework for testing compliance with due process requirements as a prelude to assessing the constitutional validity of this regulation.

A. THE *ELDRIDGE* TEST

In *Goldberg v. Kelly*,¹⁶⁰ the Court held that due process requires an adequate hearing before termination of welfare benefits, at least in cases in which the recipient's appeal involves factual issues or the application of law to particular facts.¹⁶¹ In his largely conclusory opinion for the Court, Justice Brennan suggested that the determination of when a prior hearing is required involves a balancing of the harm to individuals caused by post-termination proceedings and the harm to the government if termination is delayed. Explicit guidelines for the factors to be balanced, however, were not articulated until the Court was faced with the question whether due process requires pre-deprivation hearings outside the narrow context of welfare benefits.

After a series of decisions that attempted to assess the con-

159. 45 C.F.R. § 205.10(a)(6)(i)(A) (1979).

160. 397 U.S. 254 (1970).

161. *Id.* at 254, 268 n.15. See notes 38-45 *supra* and accompanying text. The Court did not define the types of issues that fell into these categories.

stitutional validity of a variety of administrative proceedings,¹⁶² the Court, in *Mathews v. Eldridge*,¹⁶³ unanimously agreed on a set of factors to be considered in determining the requirements of due process.¹⁶⁴ Following a determination by the Social Security Administration that he was unable to engage in any substantial gainful activity, the plaintiff in *Eldridge* became eligible for and received disability benefits. After a routine review of his case, the agency determined that his disability had ceased and notified him that his benefits would be terminated immediately. Eldridge filed an action in federal court challenging the constitutionality of the procedures that permitted the termination of his benefits before he had an opportunity for an administrative hearing on the issue of his disability. The court found the nature of the issues being considered by the agency indistinguishable from those in *Goldberg*, and therefore remanded the case to the Social Security Administration with directions to reinstate Eldridge's benefits and to afford him a hearing before any subsequent termination.¹⁶⁵ The Fourth Circuit affirmed on the basis of the district court's opinion.¹⁶⁶

On certiorari, the Supreme Court restated the general rule that "due process is flexible and calls for such procedural protections as the particular situation demands,"¹⁶⁷ and outlined the three factors that must be considered to determine the dictates of due process in a particular case:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens

162. See cases cited in Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 28 n.1 (1976).

163. 424 U.S. 319 (1976).

164. *Id.* at 335. The test appears at text accompanying note 168 *infra*. The decision in *Eldridge* was not unanimous. Justices Brennan and Marshall joined in a dissent that neither approved nor disapproved of the three-factor test. Both Justices, however, have since authored opinions in which they used the *Eldridge* due process test. See *Board of Curators v. Horowitz*, 435 U.S. 78, 100 (1978) (Marshall, J., concurring in part and dissenting in part); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 848-49 (1977) (Brennan, J.). Justice Stevens, who did not participate in *Eldridge*, joined in Justice Brennan's majority opinion in *Smith*. The Court has continued to cite the *Eldridge* due process test as the constitutional standard in its most recent cases. See, e.g., *Mackey v. Montrym*, 443 U.S. 1, 10 (1979); *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 12-14 (1979).

165. *Eldridge v. Weinberger*, 361 F. Supp. 520, 524 (W.D. Va. 1973).

166. *Eldridge v. Weinberger*, 493 F.2d 1230 (4th Cir. 1974) (per curiam).

167. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

that the additional or substitute procedural requirement would entail.¹⁶⁸

By articulating these factors, the Court suggested that it would engage in a factual analysis to determine the precise contours of the particular situation in which the due process issue was posed. In assessing each factor, however, the Court ultimately resorted to making unsubstantiated guesses about the nature of the underlying facts.

The Court began by stating that it would examine the nature of the injury to the disability recipient whose benefits were terminated prior to a hearing. The Court acknowledged that although disability benefits, unlike welfare benefits, are not paid on the basis of need, the degree of deprivation suffered by the individual is likely to be similar because recipients of disability benefits are "unable to engage in substantial gainful activity."¹⁶⁹ The Court also observed that the length of time between cessation of benefits and a final decision after a hearing would probably exceed one year.¹⁷⁰ Although the Court recognized that the current procedures could impose significant hardship, it concluded that the disabled worker's need is likely to be less than that of a welfare recipient because of the disabled worker's possible access to other private resources or to public assistance.¹⁷¹ The majority of the Court, however, declined to acknowledge the extent of deprivation actually suffered by the plaintiff,¹⁷² nor did the Court cite any evidence to show that disability recipients as a group actually do have access to private resources or public assistance. The Court did not appear to be aware that public assistance in many states is available only to those with the most limited liquid assets.¹⁷³ Thus, a disability recipient whose benefits are suspended might

168. 424 U.S. at 335.

169. *Id.* at 341.

170. *Id.* at 342.

171. *Id.* at 342 & n.27.

172. Justice Brennan's dissent noted that after Eldridge's disability benefits were terminated, his home was subjected to foreclosure and his family's furniture was repossessed, "forcing Eldridge, his wife and their children to sleep in one bed." *Id.* at 350.

173. See STAFF OF SUBCOMM. ON FISCAL POLICY OF THE JOINT ECONOMIC COMM., 93D CONG., 2D SESS., STUDIES IN PUBLIC WELFARE, PAPER NO. 20, HANDBOOK OF PUBLIC INCOME TRANSFER PROGRAMS: 1975, at 351 (Comm. Print 1974). General Assistance property limits vary from state to state and often from county to county. In general, they are the same or more restrictive than requirements of the AFDC program. In Florida, for example, some counties do not give assistance to persons with any available resources. See OFFICE OF FAMILY ASSISTANCE, SOCIAL SECURITY ADMINISTRATION, U.S. DEPT OF HEALTH, EDUCATION, AND WELFARE, HEW PUB. NO. (SSA) 78-21239, CHARACTERISTICS OF GENERAL ASSISTANCE IN THE UNITED STATES 24 *passim* (1978).

be forced to forfeit equity in a home or automobile before becoming eligible for public assistance. To examine the extent of deprivation for disability recipients, the Court, without reference to any empirical evidence, created an idealized disability recipient and determined that it would not be intolerable for him to suffer a suspension of benefits for more than a year.

The Court next considered the reliability of existing pre-termination procedures and the probable value of any additional or substitute procedural safeguards. The first step in evaluating such a procedure, according to the Court, is to identify the issue that the procedures are designed to resolve.¹⁷⁴ In *Eldridge*, the Court identified the relevant issue to be whether there was a medically determinable physical or mental impairment,¹⁷⁵ despite the fact that disability decisions more often turn upon the effect of a medical condition rather than upon the existence of the condition itself.¹⁷⁶ The Court stated that this assessment was a "more sharply focused and easily documented decision than the typical determination of welfare entitlement,"¹⁷⁷ although it cited no evidence in support of this characterization of the typical welfare appeal. The Court also stated that in welfare cases "a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process."¹⁷⁸ The Court cited no authority for this conclusion either. Although it recognized that veracity might be an issue in some disability cases, the Court stated that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions."¹⁷⁹

Having identified the issue in disability hearings as one generally involving the existence of medically determinable facts, the Court concluded that disability recipients, unlike welfare recipients, could adequately mold their arguments to the issues without oral presentation since they can complete written questionnaires identifying relevant information, submit documentary information from medical sources, and examine

174. 424 U.S. at 343.

175. *Id.*

176. STAFF OF SUBCOMM. ON SOCIAL SECURITY OF THE HOUSE COMM. ON WAYS AND MEANS, 94TH CONG., 2D SESS., DISABILITY INSURANCE—LEGISLATIVE ISSUE PAPER 17 (Comm. Print 1976), cited in Mashaw, *The Supreme Court's Due Process Calculus*, *supra* note 162, at 42 n.52.

177. 424 U.S. at 343.

178. *Id.* at 343-44.

179. *Id.* at 344.

the files the agency relied on in making the disability determinations.¹⁸⁰

The Court then attempted to determine whether, despite these safeguards, the process still yielded inaccurate results. The Court immediately recognized the difficulty of assessing the accuracy of an administrative process: should it look at the percentage of appealed cases that are reversed or at the percentage of error for all denials, including both appealed and unappealed decisions? Furthermore, if the Court seeks to ascertain the degree of error outside the appeals process, how is error to be defined and determined? Rather than attempting to resolve these questions, the Court chose to disregard the statistical evidence, including evidence which showed that the reversal rate on appeal was as high as 58.6%.¹⁸¹ The Court simply stated that statistics on reversal rates do not adequately reveal administrative accuracy, because reversals could have resulted from the introduction of new evidence later in the appeals process.¹⁸² Thus, although the Court in *Eldridge* had established administrative accuracy as the central function of due process, it was willing to decide the case despite the absence of reliable evidence or even an appropriate standard upon which to test administrative accuracy in the disability determination process.

The final factor considered by the *Eldridge* Court was the public interest. Although this inquiry was labelled by the Court as a search for the "public interest," the Court's analysis focused exclusively upon financial costs and omitted discussion of nonfinancial public interests that might be served by a pre-termination proceeding. The Court did not mention the governmental interests earlier noted by Justice Brennan in *Goldberg*

180. *Id.* at 345-46. The Court failed to note that procedural safeguards of this nature are also present in the AFDC appeals process. The Court itself mandated in *Goldberg* that notice to recipients detail the reasons for the proposed termination. 397 U.S. at 267-68. Current federal regulations also require that a termination notice include a statement of the specific regulations supporting the action. 45 C.F.R. § 205.10(a)(4)(i)(B) (1979). Regulations also guarantee the recipient's right to establish all pertinent facts and circumstances and to advance any arguments without undue interference. *Id.* § 205.10(a)(13)(iv)-(v). *Goldberg* ensured that the hearing decision would be based only on information available to the recipient because it required that the hearing officer's decision be based exclusively on the hearing record. 397 U.S. at 271. The current regulations go further and require that the recipient shall be given an adequate opportunity to examine the contents of his case file or documents to be used by the agency at the hearing within a reasonable time before the hearing, as well as during the hearing. 45 C.F.R. § 205.10(a)(13)(i) (1979).

181. 424 U.S. at 346. *But see id.* at 346 n.29.

182. *Id.* at 345-47.

that would be advanced by prior hearings, such as fostering dignity among poor people and avoiding the societal malaise that flows from the frustration and insecurity felt by eligible recipients erroneously deprived of benefits.¹⁸³ Having restricted its inquiry to the determination of actual monetary costs,¹⁸⁴ the Court made no attempt to ascertain them and instead merely speculated about their possible magnitude. The Court assumed that there would be a larger number of requests for hearings if recipients knew that benefits would be continued pending the hearing. Although the Court surmised that in "most cases" this "attractive option" would be exercised,¹⁸⁵ the Court did not seek to determine whether AFDC recipients who have been entitled to the continuation of their benefits under *Goldberg* for the past several years have in "most cases" chosen to request hearings.¹⁸⁶ The evidence, in fact, suggests that appeal rates since *Goldberg* remain well under ten percent and probably are not influenced by the option of continued benefits.¹⁸⁷ Furthermore, even if the promise of continued benefits did encourage appeals, certainly in some of those appeals the recipients would ultimately prevail. Thus, the only costs that should enter into the calculation are the cost of providing hearings for ineligible recipients who would not have appealed but for the promise of continued benefits and the cost of continued benefits for all ineligibles. The magnitude of these costs would depend upon the number of appeals by recipients ultimately

183. 397 U.S. at 264-65.

184. The Court did note, however, the government's interest in conserving scarce fiscal and administrative resources. See 424 U.S. at 348.

185. *Id.* at 347.

186. Although the Court noted in *Goldberg* that "most terminations are accepted without challenge," 397 U.S. at 265, the *Eldridge* Court made no reference to that assumption.

187. This is suggested by data showing that the appeal rates for assistance denials (where no benefits are continued) appear to be higher than for terminations. In a recent study of Wisconsin welfare hearings, the researchers found that there were appeals from less than 4% of the AFDC terminations in the period 1969-1976 and that for the 1975-1976 period, only 1.8% of the terminations were appealed. Rates of appeal for applicants denied assistance were as high as 10.4% in 1974, but in 1975-1976 they dropped to 2.2%. Special Student Project, *Procedural Due Process and the Welfare Recipient: A Statistical Study of AFDC Fair Hearings in Wisconsin*, 1978 WIS. L. REV. 145, 202 [hereinafter cited as *Wisconsin Hearings Project*]. By comparing appeal statistics to the national total of agency decisions in the categorical assistance programs, Professor Mashaw concluded that the appeals are taken from about 6% of the denials and terminations. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 784-85 n.33 (1974).

found ineligible and the length of time between notice of termination and a hearing decision. As the Supreme Court in *Goldberg* observed, the promptness of hearing decisions, and therefore the length of time for which benefits would have to be continued, is within the control of the government.¹⁸⁸ The *Eldridge* Court nevertheless did not attempt to calculate the actual costs of pretermination hearings in Social Security disability cases, concluding only that "experience with the constitutionalizing of governmental procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial."¹⁸⁹ Consistent with the absence of empiricism and specificity in the remainder of its analysis, the Court failed to explain just what "experience" it was referring to and what the magnitude of the costs had been. The Court's ultimate conclusion in *Eldridge* was that, in light of its analysis of the three relevant factors, due process did not require a pre-termination hearing for recipients of Social Security disability benefits.¹⁹⁰

In sum, the *Eldridge* three-factor analysis for calculating the requirements of due process sacrifices the unquantifiable values of due process, such as human dignity and the appearance of governmental fairness, and limits consideration to values that are theoretically susceptible of more precise ascertainment, such as deprivation, accuracy, and cost. Such a narrowing of the values considered relevant to a determination of due process might be justified on the ground that the exclusive use of relatively quantifiable values could result in more predictable and principled constitutional decisionmaking. The Supreme Court, however, immediately abandoned any effort to reach those objectives by its willingness in *Eldridge* to utilize wholly arbitrary assumptions about the facts underlying each consideration. The end result is that the Court has sacrificed important unquantifiable due process values in exchange for a

188. See 397 U.S. at 266. Present regulations governing appeals in state AFDC programs require that final administrative action must be taken within 90 days from the date of the request for a hearing. 45 C.F.R. § 205.10(a)(16) (1979). Statistics collected by HEW showed that, in 1977, on a nationwide basis, 6.7% of the appeal requests were resolved by hearing decisions in less than one month; 64.6% in more than one month but less than three months; and 28.7% in more than three months. Texas, with the fifth largest caseload in the country, managed to issue decisions in 48.5% of its cases in less than one month. 1979 STATISTICAL REPORT, *supra* note 110, at 17 (Table 11).

189. 424 U.S. at 347.

190. *Id.* at 349.

seemingly objective analytical structure that can be used to camouflage subjective, result-oriented decisionmaking.

Commentators have argued that the Supreme Court should use a broader test for the determination of due process rights in order to effectuate the unquantifiable values that are generally advanced by due process.¹⁹¹ The *Eldridge* framework, however, has been endorsed by every member of the Court as the appropriate test of administrative due process.¹⁹² Since the Court is unlikely to abandon the *Eldridge* test in the near future, a more effective approach would be to assume the adoption of its three-factor framework, yet attempt to encourage the Court to take seriously its own exhortation that due process requires a particularistic study of the facts underlying each of the factors. Only by doing so can it be determined whether the *Eldridge* test can yield rewards that might justify the Court's refusal to consider the broader values of due process. It may even be that an *Eldridge* analysis, explicitly applied to further administrative accuracy, will have the ultimate effect of furthering broader due process values. Persons who believe that the government has considered their cases under procedures designed to achieve accuracy are likely to believe that their individual interests have been respected. An administrative agency that produces accurate decisions will provide assurance to the public that it treats individuals fairly. It is possible, therefore, that honest application of the *Eldridge* framework would not only produce predictable and principled constitutional decisions, but also further due process values such as human dignity and public belief in the fairness of government action.

B. APPLYING *ELDRIDGE* TO PRIOR HEARINGS ON QUESTIONS OF LAW

The constitutionality of the regulation that allows interrup-

191. Professor Mashaw has argued that due process issues would be more appropriately resolved by consideration of whether proposed procedures would advance individual dignity, equality, and the maintenance of tradition. Mashaw, *The Supreme Court's Due Process Calculus*, *supra* note 162, at 49-57. Professor O'Neil has suggested a somewhat longer but largely parallel set of interests as an appropriate framework for due process adjudication: accuracy and fairness, accountability, visibility and impartiality, consistency and integrity. O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, 1970 SUP. CT. REV. 161, 184-90. See also Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978); *Wisconsin Hearings Project*, *supra* note 187, at 169-70.

192. See note 164 *supra*.

tion of assistance to a recipient who raises a question of law apparently has never been directly addressed by the courts. The cases that have litigated the issue of continuation of assistance have uniformly involved challenges to grant reduction or termination resulting from a change in state law or policy affecting broad classes of recipients,¹⁹³ rather than a challenge to an interpretation of law made in an individual case.¹⁹⁴ Although several courts have considered, in dicta, the constitutionality of discontinuing assistance to individuals who raise a question of law,¹⁹⁵ no case has applied the *Eldridge* criteria to the resolution of this constitutional issue.¹⁹⁶ This section examines the

193. *E.g.*, *Russo v. Kirby*, 453 F.2d 548 (2d Cir. 1971); *Viverto v. Smith*, 474 F. Supp. 1122 (S.D.N.Y. 1979); *Whitfield v. King*, 364 F. Supp. 1296 (M.D. Ala. 1973) (three-judge district court), *aff'd mem.*, 431 U.S. 910 (1977); *Provost v. Betit*, 326 F. Supp. 920 (D. Vt. 1971); *Merriweather v. Burson*, 325 F. Supp. 709 (N.D. Ga. 1970), *aff'd in relevant part*, 439 F.2d 1092 (5th Cir. 1971). Some of these cases are discussed at note 85 *supra*.

194. The federal regulations mandate different procedural treatment for cases involving issues of law in which grant adjustments affect broad classes of recipients. See notes 119-125 *supra* and accompanying text. Courts have approved the denial of prior hearings in cases involving statewide policy changes on the basis that the state action is more appropriately tested under the constitutional limits on legislative rather than adjudicative decisions. See cases cited in note 193 *supra*, particularly the discussion of the issue in *Russo v. Kirby*, 453 F.2d 548, 551 (2d Cir. 1971).

195. For example, in a case arising prior to promulgation of the current federal regulations, in which the state had terminated assistance to all children residing with stepfathers, the Seventh Circuit held that even if a case presents a pure issue of law, the recipient must be given an "adequate opportunity for argument" before benefits are terminated. *Mothers' & Children's Rights Org. v. Sterrett*, 467 F.2d 797, 800 (7th Cir. 1972). After the promulgation of the federal regulation allowing the hearing officer to decide whether a case raises solely a legal question and thereafter to discontinue benefits, a federal district court upheld the regulation even though the issue before the court was limited to a grant adjustment affecting classes of recipients. *Burlingame v. Schmidt*, 368 F. Supp. 429, 433-34 (E.D. Wis. 1973).

196. A recent decision of the Supreme Court suggests that at least a majority of the Court would be prepared to find that different due process protections govern hearings on questions of law, as opposed to questions of fact. The context in which that suggestion was made, however, provides little guidance as to how the Court might resolve the constitutionality of the federal welfare regulation. In *Mackey v. Montrym*, 443 U.S. 1 (1979), the Court considered the constitutionality of a Massachusetts statute that mandates suspension of a driver's license for refusal to take a breath analysis test upon arrest for driving while under the influence of intoxicating liquor. The majority, applying the standards of *Eldridge*, held that no prior hearing was required, in part because of the limited risk of error in determining whether an individual had refused to take the test. The majority suggested that there was not any factual dispute in this case and that an evidentiary hearing would be "ill-suited for resolution of . . . questions of law." *Id.* at 15 & n.8. The Court noted that it was unclear whether the Registrar of Motor Vehicles, from whom the plaintiff sought a pre-suspension hearing, even had plenary authority to resolve questions of law. *Id.* The Court did not address the hypothetical question whether, if the plaintiff

application of each of the three *Eldridge* factors to the continuation of assistance for a welfare recipient who raises only an issue of law.

The first factor to be considered is the degree of deprivation encountered by an AFDC recipient whose benefits are discontinued. The *Goldberg* Court noted that a welfare recipient's condition differs from that of virtually anyone else whose government benefits are ended because termination of a welfare recipient's benefits "may deprive an *eligible* recipient of the very means by which to live while he waits."¹⁹⁷ This characterization is surely an accurate one. A study of the extent to which federal social welfare programs provide benefits to those who were poor before the government transfer revealed that, in the AFDC program, 93.4% of the benefits go to people who would be poor without them, a significantly higher percentage than any other cash transfer program.¹⁹⁸ Furthermore, the degree of

raised only a question of law and if the official had authority to decide legal questions, a pre-suspension hearing would be required and if so, what procedures would be appropriate to resolve legal disputes. However, the four dissenting justices found that "there was clearly a significant factual dispute in this case," *id.* at 23, and reasoned that if only a question of law was in issue, due process required the provision of procedures that could resolve the legal dispute. *Id.* at 27-30.

197. 397 U.S. at 264 (emphasis in original). The Court expressed concern that discontinuation of benefits places a recipient in a desperate situation in which the need to satisfy daily subsistence requirements will interfere with the person's ability to seek redress from the welfare bureaucracy. The Supreme Court in *Eldridge* quoted from its characterization of the desperate situation of the welfare recipient in *Goldberg*, but concluded that the Social Security disability recipient was likely to be less needy than the welfare recipient. 424 U.S. at 340-43.

198. R. PLOTNICK & F. SKIDMORE, PROGRESS AGAINST POVERTY: A REVIEW OF THE 1964-1974 DECADE 212 (1975). This study of 1972 federal antipoverty expenditures also reported that 57.8% of Social Security benefits and 76.3% of the federal funds spent on emergency assistance and aid to the aged, blind, and disabled went to the pre-transfer poor. *Id.* Of state and local expenditures for general assistance and aid to the aged, blind, and disabled, 78.1% went to the pre-transfer poor. *Id.* at 217. The only state or federal government programs to provide assistance to a higher percentage of poor people than AFDC were programs providing in-kind goods or services that served far fewer people than AFDC. *Id.* at 212-18. Many of these in-kind programs provide benefits that go beyond basic subsistence needs, such as dental care, education, and job training, so that while they might serve a slightly higher percentage of poor people than AFDC, the degree of deprivation suffered by those whose in-kind benefits are discontinued would likely be less than that encountered by AFDC recipients whose benefits are terminated. The combined AFDC and food stamp benefits received by AFDC recipients in 1978 were inadequate to meet the minimum standards for subsistence, defined by the federal poverty line, in all states except Hawaii. CENTER ON SOCIAL WELFARE POLICY AND LAW, TABLE OF ANNUAL AFDC AND FOOD STAMP BENEFITS FOR A FAMILY OF FOUR WITH NO OTHER INCOME—1978 (March 1979). In thirteen states, combined AFDC and food stamp benefits were less than 70% of the poverty line. *Id.* In Mississippi

deprivation suffered by an AFDC recipient whose benefits are discontinued prior to a decision on the merits of an appeal will be the same regardless of the nature of the issue raised by the appeal. Thus, AFDC recipients, whether raising issues of law or fact, suffer a greater degree of deprivation when faced with discontinued benefits than any other beneficiaries of government programs.

The second factor to be considered is the accuracy of bureaucratic decisionmaking and the efficacy of the hearing process to discern and correct bureaucratic error. The Supreme Court noted in *Eldridge* that the first step in the evaluation of the administrative process is to identify the nature of the inquiry in which the agency is engaged.¹⁹⁹ If the constitutional right to due process is to rest, at least in part, upon the evaluation of administrative accuracy, then such an evaluation cannot be conducted without first identifying the nature of the issues that the decisionmaking process is required to resolve. However, the constitutional decision and the administrative evaluation upon which it relies are rendered a sham if the Court is willing to adopt an unsubstantiated assumption about the nature of the issues raised as the foundation upon which its analysis is built. That is just what the Court did, both in *Goldberg* and in *Eldridge*.²⁰⁰ If the Court concludes that due process determinations must depend on facts rather than theoretical values, there is no excuse for accepting unverified factual assumptions when the facts in question are capable of empirical verification. Part VI of this Article demonstrates that the character of the issues raised by welfare terminations can be empirically verified.²⁰¹

Once the nature of the issues raised is identified, it is necessary to determine whether existing administrative procedures are adequate to resolve those issues. To assess the constitutionality of the federal regulation that denies continued assistance to persons raising an issue of law,²⁰² it is necessary

in 1978, the maximum AFDC benefits for a family of four were \$120 a month. *Id.*

199. 424 U.S. at 343.

200. The Supreme Court assumed in *Goldberg* that veracity and credibility are at issue in many welfare termination proceedings. See notes 177-178 *supra* and accompanying text. The *Eldridge* Court reaffirmed the characterization of welfare hearing issues that it had made in *Goldberg*, and suggested that questions of credibility arose in "many" welfare cases, and that such questions were "typical" of the "generality of cases" arising from welfare appeals. *Mathews v. Eldridge*, 424 U.S. at 343-44.

201. See notes 217-245 *infra* and accompanying text.

202. See note 79 *supra*.

to know how well the administrative process, short of a hearing, is able to resolve questions of law. If it is found that the bureaucracy fails to resolve correctly some significant number of such issues, it is necessary to know whether hearings can correct administrative errors of law or whether only judicial decisionmaking can do so. These issues, too, can be empirically tested. If recipients who raise issues of law in their appeals frequently receive favorable decisions after hearings, that fact suggests both that bureaucratic procedures alone are not adequate for the resolution of legal disputes and that hearings can effectively serve to correct bureaucratic errors. Part VI, therefore, also attempts to ascertain the success rate of welfare recipient appeals raising solely an issue of law.²⁰³

The final factor in the *Eldridge* due process analysis is the cost of providing additional protection. Since the current regulations already require the continuation of assistance until the date of the hearing for those who raise solely issues of law,²⁰⁴ the only additional cost incurred would be the cost of continuing assistance from the date of hearing to the date of decision. Ascertainment of the additional cost requires a determination of (1) the number of hearings that would be requested by those ultimately found ineligible, (2) the length of time for decisionmaking in which benefits would be continued, and (3) the cost of providing the hearing itself for ineligible recipients who would not have appealed but for the promise of additional continued benefits. A precise calculation of costs based on a determination of these factors would be difficult to produce. The first and third factors require an understanding of the influences that affect a recipient's decision to appeal and the comparative presence of such influences in cases raising legal, as opposed to factual, issues. Little is known about recipient appeal behavior²⁰⁵ and such an investigation is beyond the scope of this Article. The second factor is also difficult to ascertain empirically because its magnitude is largely within the control of the state. It is possible, however, that this time interval could be minimal or even nonexistent.²⁰⁶

203. See notes 246-262 *infra* and accompanying text.

204. 45 C.F.R. § 205.10(a)(6)(i)(A) (1979). Although the cost of the hearing itself may be greater for hearings on legal questions because of the possible need for additional research time, these costs are already borne by the current system that requires provision of a hearing and decision on a question of law, even if benefits are interrupted.

205. *Wisconsin Hearings Project*, *supra* note 187, at 200-04.

206. Recipients are entitled, under the current regulations to a minimum of ten-days prior notice. 45 C.F.R. § 205.10(a)(4)(i)(A) (1979). The time between

These considerations make it impossible to determine with any certainty the additional costs that would be encountered by continuing benefits to recipients until a decision is rendered on the merits of an appeal, regardless of the nature of the issue raised. There are two sources of information, however, that may provide some idea of whether these costs would be so great as to outweigh the other two *Eldridge* considerations of deprivation and accuracy. The first of these is the experience of the states in complying with the holding of *Goldberg* requiring maintenance of benefits in cases in which there are factual controversies. When the states were asked by HEW to substantiate their initial claims that *Goldberg* would produce intolerable administrative costs,²⁰⁷ no data were forthcoming.²⁰⁸ Furthermore, the states have not subsequently sought to have the courts or HEW reconsider the requirement of pre-termination hearings on the ground that the benefits do not outweigh the financial cost. Thus, the states, who were at first extremely hostile to pre-termination hearings for fact questions, now appear to find such hearings useful, or at least tolerable. It seems likely that states would arrive at the same conclusions if they were constitutionally required to provide pre-termination hearings for legal issues, so long as recipients raising such issues have a comparable success rate to recipients raising questions of fact.

More direct evidence of the tolerability of the administrative costs of pre-termination hearings on questions of law is available from the operation of the AFDC and Supplemental Security Income (SSI)²⁰⁹ programs. As we have seen, the cur-

notice and actual termination is likely to exceed ten days because AFDC payments are usually paid monthly and the bureaucratic mechanism for issuing checks may not be responsive to efforts to effectuate changes begun as few as ten days before the end of the month. ADMINISTRATION REPORT, *supra* note 13, at 145, 162.

If an adequate number of hearing officers are provided, it should be possible to provide a hearing decision prior to the effective date of all terminations, so that no benefits would ever be unnecessarily paid to a recipient who would be found after a hearing to be ineligible. Although the provision of additional hearing officers would involve increased state personnel costs, these costs might be recouped from the amount of benefits that would otherwise have been paid to ineligible recipients pending a hearing decision. If the time between the effective date of a notice of intent to terminate and the rendering of a hearing officer's decision could, in fact, be reduced to zero and if that fact could be effectively communicated to welfare recipients, the cost of hearings conducted for recipients who would not have requested a hearing, but for the promise of continued assistance, should also approach zero.

207. See notes 69-70 *supra* and accompanying text.

208. See note 71 *supra* and accompanying text.

209. 42 U.S.C. §§ 1381-1385 (1970) (amended 1978).

rent federal regulations governing the AFDC program permit the states, if they choose, to continue benefits in all cases regardless of the nature of the issue raised by the appeal.²¹⁰ That at least twenty-five states continue benefits in all cases,²¹¹ suggests that a substantial number of state welfare administrators have decided that the benefits of continuing assistance in appeals raising only issues of law outweigh the price of that continued assistance. The administration of the Supplemental Security Income program suggests a similar cost-benefit conclusion. When the federal government took over the categorical assistance programs for adults,²¹² it was under no clear constitutional compulsion to supply pre-termination hearings in cases other than those raising factual issues.²¹³ Nevertheless, federal regulations governing the SSI program provide for continuation of benefits in all cases, regardless of the nature of the issue, until a decision is rendered on the merits of the appeal.²¹⁴ Thus, in a program that is generally similar to AFDC, HEW appears to have concluded that the provision of continued benefits in cases raising only legal issues outweighs the costs of benefit continuation.²¹⁵

210. See note 93 *supra*.

211. See notes 104-105 *supra* and accompanying text. Although only eighteen states have an explicit policy of continuing benefits in all cases, at least seven other states follow that policy in practice. Such a *de facto* inclusive continuation policy may exist in additional states with a contrary formal policy whose representatives merely failed to volunteer such information in the survey.

212. The SSI program was created in 1974 when Congress federalized the programs of Aid to the Aged, Blind and Disabled, which had previously been administered by the states under federal regulations, exactly as AFDC is administered today.

213. In *Wheeler v. Montgomery*, 397 U.S. 280 (1970), decided on the same day as *Goldberg*, the Supreme Court held that the requirement of a pre-termination hearing applied to the Old Age Assistance program, one of the predecessors of SSI.

214. 20 C.F.R. § 416.1336(b) (1979).

215. One distinction between AFDC hearings and SSI hearings is the possibility that SSI hearings include a larger percentage of hearings on issues of fact or the application of law to fact than AFDC hearings. Since disability is an eligibility condition for SSI recipients who are neither aged nor blind, one would expect that a large percentage of SSI hearings would be concerned with the nature of the applicant's medical condition and whether it meets the program's definition of disability. The author is not aware of any empirical studies on the nature of issues raised in SSI hearings. About half of SSI recipients qualify for benefits on the basis of disability, whereas the eligibility of only 7.7% of AFDC children is based on the incapacity of a parent. STAFF DATA, *supra* note 10, at Tables 14, 27. For purposes of cost-benefit analysis, the nature of the issues raised by the appeals would not be important so long as the recipient success rates in different kinds of appeals were about the same. Another possibly relevant distinction between the SSI and AFDC programs is their relative size. In

In sum, although the financial cost of continuing benefits in all AFDC cases cannot be precisely calculated from available data, a significant number of state and federal welfare administrators have concluded that the costs of continued benefits, whatever their magnitude, are outweighed by the advantages of continuing assistance in all cases. This evidence, together with the ability of states to reduce, or even eliminate, additional costs by the prompt rendering of hearing decisions,²¹⁶ demonstrates that cost factors should not preclude prior hearings if it appears that prior hearings are appropriate for welfare appeals raising solely issues of law based on the *Eldridge* factors of deprivation and accuracy. Since the substantial degree of deprivation suffered by AFDC recipients extends to recipients whose appeals are based on issues of law, the factor that will ultimately determine whether due process mandates the provision of prior hearings is accuracy. Part VI of this Article therefore considers evidence of whether current bureaucratic procedures are adequate to assure correct assessment of legal issues affecting the provision of welfare benefits and, if not, whether welfare hearings can be an effective mechanism for the correction of errors of law.

VI. AN EMPIRICAL STUDY OF THE EFFICACY OF WELFARE HEARINGS ON QUESTIONS OF LAW

Hearings on questions of law can only improve the accuracy of the administrative process if some termination decisions actually are made on questions of law rather than questions of fact. Therefore, an attempt will be made to assess the validity of the Supreme Court's assertion that welfare appeals arising from terminations generally concern factual questions in which credibility and veracity are at issue.

If it is found that welfare terminations regularly raise issues of law, it is necessary to determine how well the administrative process, short of a prior hearing, resolves legal questions and whether a prior hearing could significantly improve the level of accuracy. If recipients who raise issues of

October 1977, there were 10.8 million AFDC recipients in 3.5 million families. In that month, 4.2 million people received SSI. STAFF DATA, *supra* note 10, at Table 1. In the AFDC program, the number of families may be a better reflection of the number of potential hearings than would be the total number of recipients. For purposes of policy-making, these differences in program size and nature of issues raised are probably not as important as the substantial difference in the political acceptability of the two programs.

216. See note 206 *supra* and accompanying text.

law in their appeals frequently receive favorable decisions after hearings, that would suggest both that bureaucratic procedures alone are not adequate for the resolution of legal disputes and that hearings can effectively correct bureaucratic errors.²¹⁷ Ascertainment of the success rate of appeals raising solely issues of law is therefore vital to a determination of whether due process would require a prior hearing on welfare appeals raising solely an issue of law. An effort will therefore also be made to ascertain the success rate of such appeals.

To determine whether welfare appeals actually raise legal, as opposed to factual, issues and to determine the success rate of appeals on questions of law, it is necessary to examine the experience of welfare appeals in a state that continues assistance to all recipients, regardless of the nature of the issue raised by the appeal, until a hearing decision is rendered. Since Minnesota is one such state, the experience of welfare appeals in Minnesota was surveyed.

217. The Supreme Court, in *Mathews v. Eldridge*, 424 U.S. 319 (1976), suggested that it was in somewhat of a quandary over how to determine administrative accuracy and what weight to give to reversal rates of appealed administrative decisions as a reflection of administrative accuracy. See notes 181-182 *supra* and accompanying text. In a subsequent case, however, six members of the Court found adequate evidence of administrative error to justify a pre-termination proceeding on the basis of anecdotal reports of administrative error and a study in another jurisdiction that errors were identified in 16% of complaints investigated. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 18 n.21 (1978). In a prior hearings case resolved on statutory, as opposed to constitutional grounds, the Court found that a reversal rate of 30% following hearings was sufficient to hold that there was an intolerably high risk of error in bureaucratic decisionmaking in the absence of hearings. *Califano v. Yamasaki*, 442 U.S. 682, 697 (1979). For a full discussion of the case, see notes 141-152 *supra* and accompanying text. Although success rates in appealed decisions may not be the best method of ascertaining administrative errors of law, it is the only one readily available. Theoretically, an independent review of every AFDC file might be conducted to see if any decisions made by caseworkers were based on erroneous assumptions about the applicable law. Since the caseworker's determination of eligibility and benefit level in every case is based on a long list of assumptions about the nature of the applicable law, an independent review would require legal research into the validity of each of these assumptions for each file. Although HEW has once again mandated that the states include review of negative case actions (denials and terminations) in their Quality Control programs, the method of review is designed to reveal errors of fact, not errors of law. See 42 Fed. Reg. 37205 (1977). See also ADMINISTRATION REPORT, *supra* note 13, at 223-26. In adopting the assumption that recipient success on appeal is indicative of bureaucratic mistakes on questions of law, one need not be concerned, as the Court was in *Eldridge*, that recipient success may instead reflect evidence introduced for the first time in the appellate proceedings. See *Mathews v. Eldridge*, 424 U.S. 319, 346-47 (1976). In cases in which solely legal issues (as defined in this study) are involved, the outcome of the appeal is not dependent upon an assessment of the individual facts of the case.

A. MINNESOTA WELFARE HEARINGS

The AFDC program in Minnesota is administered by county welfare agencies²¹⁸ under the supervision of the state Department of Public Welfare.²¹⁹ Any person applying for or receiving AFDC benefits whose application is denied or not acted upon with reasonable promptness, or whose assistance is suspended, reduced, or terminated by a local agency, is entitled to a hearing.²²⁰ The Commissioner of the Department of Public Welfare is authorized to appoint state welfare referees and local welfare referees.²²¹ During 1977, the period included in this study, three of Minnesota's eighty-seven counties chose to have local welfare hearings.²²² The three counties with local hearings (Anoka, Hennepin, and Ramsey) are all located in the Twin Cities metropolitan area. In those counties with a local hearing officer, hearings are conducted by the local officer. A local welfare agency, applicant, or recipient aggrieved by a ruling of a local hearing officer may appeal to the state agency, in which case a second hearing is conducted by the state welfare referee.²²³ In counties without a local hearing officer, the sole administrative hearing is conducted by a state welfare referee. After the hearing at the state level, in both initial appeals and appeals following local hearings, the hearing officer recommends an order to the Commissioner of the Department of Public Welfare.²²⁴ The Commissioner may either accept the recommended order or advise the parties that he intends to refuse to accept the order.²²⁵ When such notice is given, the parties are provided an opportunity to submit written argument before the Commissioner's final decision is issued.²²⁶ During the survey period, refusals of the Commissioner to accept the recommended order of the state welfare referee were extremely rare. Any party aggrieved by a decision of the Commissioner may appeal the order to the state district court.²²⁷

218. MINN. STAT. § 256.72(1) (1978).

219. *Id.* § 256.01(4)(1).

220. *Id.* § 256.045(2) (local hearings); *id.* § 256.045(3) (state agency hearings).

221. *Id.* § 256.045(1).

222. Welfare appeals filed in Hennepin County after September 1, 1978 are heard by a state appeals referee.

223. MINN. STAT. § 256.045(3) (1978). By stipulation of the parties, the state hearing may be limited to a review of the record of the local welfare hearing.
Id.

224. *Id.*

225. *Id.* § 256.045(5).

226. *Id.*

227. *Id.* § 256.045(7).

Review in the district court is generally on the record, although the court is empowered to hear new or additional evidence if it is "necessary for a more equitable disposition of the appeal."²²⁸ Any party aggrieved by a decision of the district court may appeal the order to the Minnesota Supreme Court.²²⁹

Neither the state statute nor the state regulation governing the AFDC program limits the opportunity for a hearing on the basis of the nature of the issue raised by the appeal.²³⁰ Furthermore, regardless of the nature of the issue raised by the appeal, welfare benefits are maintained without alteration until the appeal is decided through the state or local hearing process if the recipient's appeal is filed before the agency's intended action is implemented.²³¹

B. METHODOLOGY

In order to obtain a representative picture of Minnesota AFDC appeals, the files of appeals decided by Hennepin County hearing officers and those decided by state appeals officers for the eighty-four counties that did not employ a local hearing officer were reviewed. Hennepin County, in which the city of Minneapolis is located, was included in order to reflect the urban experience. The eighty-four counties that comprised the state hearings review included all counties in the state exclusive of Hennepin County and the other two urban counties with local hearing officers.²³² These eighty-four counties contain about seventy-seven percent of the AFDC recipients in the

228. *Id.* § 256.045(8). The district court may reverse or modify the decision of the agency if it is in violation of constitutional provisions, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedure, affected by other error of law, unsupported by substantial evidence in view of the entire record as submitted, or arbitrary or capricious. *Id.* § 15.0425.

229. *Id.* § 256.045(9). Minnesota has no intermediate appellate court.

230. *Id.* § 256.045(9); 12 Minn. Code of Agency Rules § 2.044(F)(2) (1979). The state manual, which is subordinate to the state regulation and which does not have the force of law, purports to authorize the agency to deny or dismiss a request for a hearing "[w]here the only issue is one of state or federal law requiring automatic adjustments for classes of recipients." MINN. DEP'T OF PUBLIC WELFARE, AFDC PROGRAM MANUAL, VI-D (1979). With respect to the legal authority of the manual, see *McKee v. Likins*, 261 N.W.2d 566, 576-78 (Minn. 1977); MINN. STAT. §§ 15.0411-.0413 (1978); 12 Minn. Code of Agency Rules § 2.044(A)(1) (1979).

231. 12 Minn. Code of Agency Rules, § 2.044(F)(2)(d) (1979). The state manual further provides: "Note: After the local evidentiary officer renders a decision, continuation of benefits at a previous level shall not be maintained unless ordered by the local evidentiary officer, even though the client appeals the ruling to the state." MINN. DEP'T OF PUBLIC WELFARE, AFDC PROGRAM MANUAL, VI-D (1979).

232. See notes 222-223 *supra* and accompanying text.

state.²³³ Review was made of every AFDC appeal file in which a decision was rendered during the calendar year of 1977 for the eighty-five counties.²³⁴

Next a list of descriptions and definitions for the nature of issues raised by AFDC appeals was established. Several drafts of descriptions and definitions were prepared and tested with sample appeal files. The list of welfare appeal issues used in the study, with definitions and examples, is set out in the appendix. A law student research assistant who had several years' experience in state welfare administration reviewed each appeal file within the sample and identified the issue raised by the appeal, the category of issue into which it fell, the extent of the recipient's representation, and the outcome of the appeal. The author rechecked every file and categorization. For each case, the issue raised was identified by review of all the documents in the file. The issue was generally revealed by the decision of the hearing officer, but in some cases other documents in the file, such as county hearing summaries, correspondence, or exhibits, were relied upon.²³⁵

233. OFFICE OF RESEARCH AND STATISTICS, OFFICE OF POLICY, SOCIAL SECURITY ADMINISTRATION, PUBLIC ASSISTANCE RECIPIENTS & CASH PAYMENTS BY STATE AND COUNTY, FEBRUARY 1978, at 95-100 (1979).

234. It was not possible to review appeal files for earlier years because the state welfare department had destroyed all files of cases docketed prior to 1977.

Access to hearing files was controlled by provisions of the Minnesota Data Privacy Act, MINN. STAT. §§ 15.162-.1671 (1978 & Supp. 1979), which protects the confidentiality of information on individuals retained by state and local government agencies. The Act permits the dissemination of statistical reports derived from private or confidential data so long as individuals cannot be identified by the information released. *Id.* §§ 15.162(9), .163(7). The Act also authorizes an administrative agency to delegate to a person outside the agency the power to prepare summary data, if the person agrees in writing not to disclose private or confidential data on individuals, and if the agency determines that the person will not compromise the data. *Id.* § 15.163(7). In conformity with that provision, the author entered into contracts with the Department of Public Welfare and the Hennepin County Welfare Department to permit access to appeal files.

235. After repeated discussions in this Article about the difficulty of defining and applying AFDC issue categories, it may seem presumptuous to then attempt to define and apply such categories. The difficulties of definition encountered by HEW in the course of its policy formation seemed largely to arise from attempting to classify the variety of appeals into only three categories. The difficulties of application seemed to arise from the absence of clear definitions and from efforts to make a categorization earlier in the appeals process than the issue could reasonably be expected to be revealed. The methodology utilized in this study for the definition and application of issue categories was specifically designed to avoid these problems. A large number of discrete categories were defined and utilized in the categorization process. Categories were assigned only after the appeals process had been completed and the issues were revealed to the fullest extent that they could be.

C. RESULTS

The study found a total of 349 AFDC appeals decided by hearing officers in calendar year 1977 for the eighty-five Minnesota counties in the sample. Of these, sixty-nine appeals originating in Hennepin County raised the same legal issue of whether payments received under the Minnesota Homestead Credit program must be counted as income in the AFDC program. These cases were brought as individual administrative appeals because the state district court had refused to certify a case raising that issue as a class action. The Minnesota Supreme Court later held that the district court had erred in failing to certify the case.²³⁶ The state supreme court also reversed the district court's decision on the merits and held that Homestead Credit payments were not to be considered income in the AFDC program.²³⁷ Since inclusion of these Hennepin

TABLE I
Issues Raised
State and County Totals Combined

Issue*	Number of Cases	Percent of Total
I. Fact	32	11.4%
II. Application	51	18.2%
III. Legal Definition	133 ⁺	47.5% ⁺
(all subcategories)		
A. Interpretation	95 ⁺	34.0% ⁺
B. Ultra Vires	0	0%
C. Conflict with State Law	22	7.9%
D. Conflict with Federal Law	6	2.1%
E. Conflict with State and Federal Law	10	3.5%
F. Unconstitutionality	0	0%
IV. Protest of Policy	62	22.1%
V. Opinion Does Not Reveal Issue	2	.7%
Total	280 ⁺	99.9%

*Definitions and examples of issue categories are set out in the appendix.

+Excluded from the total number of cases were 69 Hennepin County appeals concerning whether payments received under the state's Homestead Credit program were to be counted as income. These cases were brought as separate appeals because the state district court erroneously failed to certify as a class action a case raising the issue. See *Murphy v. Hiniker*, 261 N.W.2d 836 (Minn. 1978). If the Homestead Credit appeals were included in the totals, the percentage of cases that raised issues of Legal Definition would be 57.9% and the percentage within the Interpretation subcategory would be 47%.

236. *Murphy v. Hiniker*, 261 N.W.2d 836, 841 (Minn. 1978).

237. *Id.* at 840-41.

County Homestead Credit appeals in the study would distort the data to overstate both the proportion of legal issues raised and the recipient success rate on such issues, they were omitted from all the reported data.

Table I sets out the results of the inquiry into the accuracy of the United States Supreme Court's assumption that welfare appeals generally concern factual questions in which credibility and veracity are at issue. The study found that only 11.4% of the cases reviewed raised questions of fact in which credibility was at issue.²³⁸ The resolution of another 18.2% of the appeals depended on the facts of the individual case, but this latter group was comprised of cases in which the facts themselves were not in dispute. This "Application" category most commonly involved issues of whether a parent who admittedly made some visits to the home nevertheless met the statutory standard for "continued absence from the home" or whether a parent with undisputed physical ailments met the statutory standard for "incapacity." Adding together the "Fact" and "Application" categories, we find, contrary to the Supreme Court's assumption, that less than 30% of the hearing decisions depended on the facts of the individual case for their resolution.

The largest proportion of appeal decisions concerned questions of legal definition in which the hearing officer was asked to clarify the meaning of language in a statute or regulation. These "Legal Definition" cases represented 47.5% or nearly half of all cases reviewed. More than 70% of the legal definition cases involved interpretation of statutory or regulatory provisions in which there was no claim that the provision conflicted with a higher legal authority. These interpretive issues accounted for 34% of the total sample.²³⁹

238. Disputes about credibility were most likely to concern whether fathers who had been reported to be continuously absent from the family home were actually living there. Another common factual issue raised in the appeals was the ownership of real or personal property.

239. Although the difference is not quantifiable, "Legal Definition" appeals in Hennepin County generally appeared to require a higher level of legal sophistication than the appeals in the outlying areas of the state. For example, several cases in Hennepin County raised the issue whether a father who qualifies for the unemployed fathers program of AFDC loses eligibility as soon as he accepts a job that is scheduled to provide him with more than 100 hours of work, or only upon his actually having worked for 100 hours. The federal regulation defines an unemployed father as one who "[i]s employed less than 100 hours a month." 45 C.F.R. § 233.100(a)(1)(i) (1979). A legal definition question that frequently arose in nonurban counties was whether an agency could terminate the assistance of a family that had received a large lump sum settlement, such as one from a Social Security appeal or personal injury case, even though all the money had been spent. Federal and state regulations provide that only

After the legal definition category, the next largest category of cases, protests of policy, accounted for 22.1% of the cases reviewed. In these protest cases, the recipients did not dispute the factual findings or the legal conclusions of the welfare agency; rather, they attended the hearing to voice their dissatisfaction with laws or policies that had adversely affected their receipt of AFDC benefits. Although this group of cases might, in a technical, legal sense, be labeled frivolous, they were certainly not perceived as such by the recipients. The files of these appeals generally revealed a strong sense of injustice and outrage on the part of the recipients.²⁴⁰ Although the category "Protest of Policy" included exclusively cases in which the hearing officer had no power to remedy the recipient's grievance, there did not appear to be any cases in which the recipient had appealed merely in order to ensure a continuation of welfare assistance. On the contrary, they were cases in which the recipients used the hearing to communicate very strongly felt messages to the welfare department.²⁴¹

In summary, Table I reveals that Minnesota welfare ap-

available income may be counted. See 45 C.F.R. §§ 233.20(a)(3)(ii)(D), .90(a) (1979); 12 Minn. Code of Agency Rules § 2.044(D)(12)(b)(1) (1979).

240. The nature of the appeals that were categorized as "Protest of Policy" is suggested by the following examples. A teenage mother objected to the termination of her welfare benefits for lack of continued absence when she and the father of her child had decided to live together to try to make a home for their child. A woman who was working but, in her opinion, not earning enough to be self-supporting, protested against the termination of her welfare benefits for excess income. A terminally ill mother whose child had gone to live with other relatives who were better able to care for the child objected to the welfare department's refusal to make the welfare check payable to her. The welfare department said that the check could not go to the mother because the child was no longer in her care, although the mother viewed her receipt of the check as her only remaining source of a sense of responsibility for her child.

Another group of cases that were categorized as protest were cases in which recipients had been deregistered from the Work Incentive (WIN) Program for noncooperation because they had not understood that the showing of good cause for failure to cooperate that they wished to make at the welfare hearing had to have been made at an earlier WIN hearing in order to have been effective. As a result, recipients who in fact had jobs, or who were in valid training programs, or who could not work because of the necessity of caring for invalid family members, came to welfare hearings at which they could do no more than ineffectively protest against the termination of their benefits.

241. The types of issues that were categorized as "Protest of Policy" are similar to the appeals that would arise out of challenges to state or federal law requiring automatic grant adjustments for classes of recipients. Federal regulations allow states to refuse to provide hearings for appeals arising out of automatic grant adjustments. See notes 119-125 *supra* and accompanying text. In protest cases, as well as in automatic grant adjustment cases, the nature of the recipient's grievance appears to belong more in a legislative or rulemaking proceeding than in an adjudicatory setting. In light of the limited resources of welfare recipients, however, the hearing proceeding may be the most effective

peals only infrequently raise factual issues that involve the credibility of witnesses and most often raise questions of law whose resolution does not depend on the particular facts of the recipient's case.

The next issue addressed in the study was whether administrative hearings on questions of law could improve the accuracy of agency decisions involving the receipt of welfare benefits. One method of answering this question is to determine the percentage of bureaucratic decisions in cases raising solely issues of law that are reversed in the hearing process. The relative utility of the hearing process for correction of legal, as opposed to factual, errors can be ascertained by comparing the recipient success rate on legal issues with success rates on factual questions. Table II sets out the success rates of clients according to the nature of the issue raised by their appeal for the sample as a whole.

TABLE II
Client Success Rates by Issue
State and County Totals Combined

Issue	Client Won		Client Lost	
	Number	Percentage	Number	Percentage
I. Fact	24	75.0%	8	25.0%
II. Application	25	49.0%	26	51.0%
III. Legal Definition	82	61.7%	51	38.3%
A. Interpretation	57	60%	38	40%
C. Conflict with State Law	18	82%	4	18%
D. Conflict with Fed- eral Law	3	50%	3	50%
E. Conflict with State and Fed- eral Law	4	40%	6	60%
IV. Protest of Policy	0		62	100%
V. Opinion Does Not Re- veal Issue	0		2	100%

Table II indicates that clients won seventy-five percent of the appeals involving solely questions of fact and issues of credibility. Clients were substantially less successful in cases of "Application," when the hearing officer's task was to apply a

avenue for communication between recipients and state government on welfare issues.

legal standard to the undisputed facts of a particular case. In the "Application" category, recipients succeeded in only forty-nine percent of their appeals.

Since the Supreme Court in *Goldberg v. Kelly* held that prior hearings were required both in cases labeled here as "Fact" and as "Application,"²⁴² it is useful to view the consolidated success rate for these two categories of issues. If the figures for issues of "Fact" and issues of "Application" are combined, clients succeeded in 59% of the cases involving either the ascertainment of facts or the application of undisputed facts to a legal standard. In other words, in the types of cases for which the Supreme Court explicitly mandated provision of a prior hearing, recipients were successful 59% of the time, a percentage that is quite close to the success rate of 61.7% for appeals that raised solely questions of law. The data thus suggest that clients were at least as successful in appealing decisions based on legal conclusions, for which *Goldberg* did not explicitly mandate a prior hearing, as they were in factual cases for which *Goldberg* required a prior hearing.²⁴³

242. 397 U.S. at 264, 268 n.15.

243. The client success rates in Table II reflect the ultimate outcomes in those cases. The state hearing files showed that a petition for review of the hearing decision was filed in the state district court in only 3 of the 280 cases. The records of the state hearing office and state attorney general suggested that in none of these cases was a motion made for a hearing in the district court. In other words, these cases were apparently abandoned at the district court level.

Client success rates were initially tabulated separately according to the level of the hearing decision at which the appeal was resolved: at a state hearing, a local hearing, or a state hearing following an appeal from a local hearing. The separate tabulation of success rates did not indicate meaningful differences in outcome depending on the level of the hearing that resolved the appeal. For that reason, the data in Table II represent the combined totals for the entire sample.

Recipients appeared to be somewhat more successful in appeals decided by local hearing officers in Hennepin County than in appeals decided by state hearing officers in cases involving issues of "Fact." Clients won 15 of 16 "Fact" cases decided at the local level and 9 of 15 "Fact" cases heard initially at the state level. Both the number of "Fact" cases in Hennepin County and the percentage of "Fact" cases in which recipients were successful was somewhat distorted by the fact that about half of the Hennepin County "Fact" cases in which recipients were successful were the result of clearly erroneous Quality Control (QC) terminations. In these cases, the county agency had terminated the recipients' benefits upon the recommendation of state QC reviewers on the ground that the fathers were no longer absent from the home. The only evidence presented in support of the QC decision in each of these cases was an automobile registration or driver's license of the father that listed the AFDC family's residence as his address. In each of these cases, the recipient at the hearing offered a satisfactory explanation for why these documents did not accurately reflect the father's residence. The hearing officer, in each case, ruled in favor of the recipient. In none of these cases did the county appeal. These

In light of the findings in Tables I and II that a substantial proportion of welfare appeals involve solely issues of law and that a substantial proportion of such appeals result in the reversal of the welfare agency's determination, a further inquiry seemed in order. One might suspect that when welfare appeals involve questions of law, welfare recipients who are not represented by an attorney would be substantially less likely to succeed. The study indicated, however, that welfare recipients represented by attorneys generally did not do any better than recipients without attorneys.²⁴⁴ In fact, in some categories of cases, recipients without any representative or with a nonattorney representative actually fared better than recipients represented by counsel. Thus, the data support the Supreme Court's conclusion in *Goldberg* that a welfare recipient need not be represented by an attorney in the required hearing in order to satisfy due process.²⁴⁵

cases thus do not seem to represent disputes between the recipient and the county agency about the recipient's eligibility, but rather instances in which an innocent recipient was being used as a pawn in a dispute between the county and the state QC reviewers.

Recipients also seemed to win somewhat less often in "Legal Definition" cases that were appealed to the state following a local hearing than in such cases decided solely by either a state or a county hearing officer. This comparison is not surprising in light of the expectation that "Legal Definition" cases for which a second administrative appeal is requested are most likely to be close questions of statutory or regulatory interpretation.

244. A recent study of Wisconsin AFDC appeals also found that attorneys have only a marginal effect upon the outcome of hearings. That study reported that of cases disposed of by hearing, clients represented by an attorney were successful 48.31% of the time and clients without representation were successful 44.53% of the time. *Wisconsin Hearings Project*, *supra* note 187, at 205-09, Table 6 at 207. It might be fruitful for further research to explore success rates for clients represented by attorneys by comparing success rates for attorneys who are welfare specialists with success rates for attorneys who have little or no experience in handling welfare appeals. The data collected here does not permit such a comparison, but a review of the files suggested that there were wide differences in the quality of representation that clients received from their attorneys. In areas of the state outside the Twin Cities, attorneys appearing at welfare hearings were frequently private attorneys whose presence at the hearing appeared to be an extension of efforts to preserve assets obtained for the client in a divorce or personal injury case. In such cases, there was usually nothing in the welfare hearing file or the hearing decision indicating that the attorney had made any legal arguments to the hearing officer. In the Hennepin County appeals, however, attorney representation usually meant representation by a welfare specialist from either the Legal Aid Society of Minneapolis or the University of Minnesota Welfare Law Clinic. The files of many of these cases contained extensive legal memoranda submitted by the recipient's attorney, and the hearing officer's opinion in these cases made frequent reference to legal arguments made by the recipient's attorney.

245. 397 U.S. at 270 ("We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires.").

TABLE III
Client Success Rates by Issue and Nature of Representation
State and County Totals Combined

Issue	Representation	Client Won		Client Lost	
		Number	Percentage	Number	Percentage
I. Fact	Attorney	7	70.0%	3	30.0%
	No Representative	14	73.7%	5	26.3%
	Non-attorney [#]	3	100.0%	0	0 %
II. Application	Attorney	7	58.3%	5	41.7%
	No Representative	14	42.4%	19	57.6%
	Non-attorney	4	66.7%	2	33.3%
III. Legal Definition ⁺	Attorney	26	65.0%	14	35.0%
	No Representative	48	61.5%	30	38.5%
	Non-attorney	8	53.3%	7	46.7%
IV. Protest of Policy	Attorney	0	0 %	4	100 %
	No Representative	0	0 %	52	100 %
	Non-attorney	0	0 %	6	100 %
V. Opinion Does Not Reveal Issue	Attorney	0	0 %	1	100 %
	No Representative	0	0 %	0	0 %
	Non-attorney	0	0 %	1	100 %

+The "Legal Definition" category here consolidates the legal definition subcategories used in Tables I and II.

#Non-attorney representatives included lay advocates employed by legal services offices, county welfare departments, and social service agencies as well as professional social workers.

Table III compares client success rates for each category of issue according to the nature of the client's representation. The only category of appeals in which clients represented by attorneys did substantially better than clients who were either not represented or represented by a nonattorney was the "Application" category. If the figures for clients represented by a nonattorney and those without any representative are combined, we find that clients without an attorney prevailed 46.2% of the time in "Application" cases, whereas clients represented by an attorney in this issue category prevailed 58.3% of the time. In the "Legal Definition" category in which one might expect that attorneys would have the greatest impact on client success rates, the presence of an attorney actually seems to have had little effect. In the "Legal Definition" category, clients with an attorney prevailed 65.0% of the time, while clients without an attorney prevailed 60.2% of the time.

D. SUMMARY

The study of AFDC appeals in Minnesota was designed to seek answers to two questions vital to the determination of whether the due process clause requires the maintenance of welfare benefits until a decision after a hearing in which the only issue raised by the recipient's appeal is a question of law. Consistent with the Supreme Court's analytical structure established in *Mathews v. Eldridge*,²⁴⁶ the study sought to ascertain (1) the nature of the issues raised by welfare appeals, and (2) whether the administrative hearing process was an appropriate mechanism for correcting erroneous determinations of a welfare agency on questions of law. The results suggest that, contrary to the Supreme Court's assumption, a large proportion of welfare appeals involve questions of law rather than questions of fact. The results also suggest that, even if attorneys are not present, the welfare hearing process can be an effective mechanism for correcting the bureaucracy's incorrect legal interpretations that otherwise would have resulted in the improper termination of welfare assistance. When these facts concerning administrative accuracy are considered in conjunction with the degree of deprivation encountered by AFDC recipients erroneously deprived of their benefits and the potentially limited additional costs of providing prior hearings,²⁴⁷ the resulting balance of interests for prior hearings on questions of law becomes identical to that in *Goldberg v. Kelly*.²⁴⁸ So long as the Supreme Court continues to reaffirm its *Goldberg* holding, the conclusion seems inescapable that due process requires the maintenance of AFDC benefits until a decision following a hearing, even if the only issue raised by the recipient's appeal is a question of law.²⁴⁹

246. 424 U.S. 319 (1976).

247. See notes 197-215 *supra* and accompanying text.

248. 397 U.S. 254 (1970).

249. To say that *Eldridge* requires prior hearings for recipients raising questions of law as well as questions of fact is not to say that due process would compel a prior hearing in all welfare appeals. The study suggested that in approximately one-fifth of the cases, those in the "Protest of Policy" category, the recipient had no likelihood of success on the merits and therefore no constitutional right to a prior hearing. On a theoretical level, one might wish to screen cases prior to the hearing to ascertain if the case were merely a "Protest of Policy" and if so, to discontinue benefits prior to the hearing. The decisions of the district court and the Supreme Court in *Yee-Litt v. Richardson*, 353 F. Supp. 996, 999-1000 (N.D. Cal.), *aff'd mem. sub nom. Carleson v. Yee-Litt*, 412 U.S. 924 (1973), however, demonstrate that pre-hearing determinations of the nature of issues raised by welfare appeals are too often incorrect and that the benefits of recipients constitutionally entitled to continued benefits are thus incorrectly terminated. On a practical level, therefore, it may be necessary to

The fact that welfare appeals today include a large proportion of cases raising solely issues of law does not necessarily mean that in 1970 the Supreme Court was wrong in assuming that welfare appeals raised largely factual issues in which credibility played a substantial part. The categorization of issues as factual or legal does not necessarily remain constant over time. As a body of law matures, questions that were earlier viewed as questions of fact or application can be rephrased as questions of law. For example, one of the appeals consolidated in *Goldberg* concerned whether a woman had to cooperate in obtaining child support payments as a condition of her AFDC eligibility.²⁵⁰ Although the issue might then have been a question of fact or application over which the welfare agency had considerable discretion, today this issue is controlled by federal statute²⁵¹ and a substantial body of detailed federal regulations.²⁵² Similarly, questions about whether a parent is required to work in order to be eligible for AFDC and the circumstances under which offered employment may be justifiably refused, questions which previously were a matter of discretion for local welfare offices,²⁵³ are now defined by federal statutes²⁵⁴ and regulations.²⁵⁵ Thus questions of cooperation in child support and work requirements, which were only recently raised as questions of fact or application, are more likely today to arise as questions of law.

The substance of welfare law has grown dramatically over the last ten years through Supreme Court and lower court cases, amendments to the Social Security Act, and the promulgation of comprehensive federal regulations. Some of those regulations have mandated that states adopt written policies and make them available to the public.²⁵⁶ Even *Goldberg* itself

continue benefits in all cases at least until the hearing, at which time the hearing officers may be able to make a more accurate assessment of the nature of the issue. At the time of the hearing, the hearing officer could direct the discontinuation of assistance for recipients whose cases raised neither an issue of law nor an issue of fact.

250. See note 41 *supra*.

251. 42 U.S.C. § 602(a)(26)(B) (1976).

252. 45 C.F.R. § 232.12 (1979) (cooperation); *id.* §§ 232.13, .40-.49 (establishment of good cause for noncooperation).

253. See A. KEITH-LUCAS, *supra* note 26, at 218; HANDBOOK, *supra* note 26, § 3401.1 (1946).

254. 42 U.S.C. §§ 602(a)(19), 630, 632, 633 (1976).

255. 45 C.F.R. §§ 224.0-77 (1979).

256. Federal regulations mandate that state agencies issue uniform rules, provide methods for making staff aware of state policies, and make program manuals and other policy issuances accessible to the public. *Id.* §§ 205.70, .100, .120.

has contributed to the growth of the law by requiring of hearing officers written decisions that state the reasons for their conclusions.²⁵⁷

Once it is established that due process entitles welfare recipients raising issues of law to a hearing prior to the termination of their benefits, it must be determined just what kind of hearing should be provided. The Supreme Court in *Goldberg* specified the procedures to be afforded welfare recipients challenging terminations involving misperception or misapplication of facts.²⁵⁸ These procedures include the right to present evidence, to confront and cross-examine adverse witnesses, and to be represented by an attorney. The Court, however, did not require that counsel be provided for recipients, nor did it insist that hearing officers have training in the law.²⁵⁹ Initially it might seem that the presence of an attorney might be necessary in a hearing involving legal issues, but that the other procedural dictates of *Goldberg* would be wholly inappropriate for hearings in which there was no necessity to introduce evidence or to confront and cross-examine adverse witnesses. Nevertheless, the Minnesota experience suggests that the hearing procedures designed in *Goldberg* for the resolution of factual disputes are well suited to accurate resolution of purely legal issues.

The Minnesota hearings on questions of law permit welfare recipients to introduce evidence and to confront and cross-examine adverse witnesses. It is also common for the hearing officer to participate in the questioning of witnesses for both sides. This free exchange of information between the parties might be necessary in hearings on questions of law in order to identify the underlying legal issue and the facts which then become relevant to its resolution. Welfare recipients generally have no understanding of the legal basis for the agency's action, even if they have received from the county a summary of issues that includes citations to provisions of the state welfare manual. Furthermore, the welfare caseworker, who is often the sole representative for the county at a hearing, is unlikely to be familiar with state or federal statutes and regulations. Usually a caseworker relies exclusively on the welfare manual, a written policy interpretation, or a supervisor's instruction, none of

257. See 397 U.S. at 271. Federal regulations provide that, subject to provisions for safeguarding confidential information, all state agency hearing decisions must be accessible to the public. 45 C.F.R. § 205.10(a)(19) (1979).

258. See 397 U.S. at 266-71.

259. *Id.*

which has the force of law.²⁶⁰ Finally, neither the caseworker nor the recipient may have a clear idea of what facts are relevant. Under such circumstances, even if there are no facts in dispute, a hearing officer may need access to accurate factual information from both sides in order to identify and resolve the underlying legal issue.

The Minnesota evidence outlined in Table III suggests that the lack of legally trained advocates or the presence of a hearing officer who is not an attorney does not preclude an accurate legal determination. The hearing decisions reviewed in this study were the product of five different hearing officers, none of whom was an attorney.²⁶¹ The hearing officers did, however, have a substantial familiarity with the hierarchy of welfare statutes and regulations both from their experience as full-time welfare hearing officers and from their backgrounds as bureaucrats in the state and county welfare departments. This suggests that although a formal legal education should not be a prerequisite for hearing officers, it may be necessary for them to have some background or training in the identification of sources of welfare law and the methods by which they are interpreted.

The surprising conclusion seems to be that if welfare departments are constitutionally required to provide hearings on appeals raising solely legal issues, the procedures at those hearings need not differ from those utilized in hearings on questions of fact. This conclusion should ease the administrative burden of providing hearings on questions of law. The Supreme Court has previously affirmed that accurate distinctions between questions of fact and questions of law can be made no earlier than at the administrative hearing.²⁶² If welfare departments were required to provide different procedures, different hearing officers, and different advocates at a hearing once it was determined that legal issues were involved, the initial hearing would have to be adjourned so that a hearing with proper procedures might be afforded. If identical procedural safeguards are provided at hearings on questions of

260. See 12 Minn. Code Agency Rules 2.044(A)(1) (1979), MINN. DEP'T OF PUBLIC WELFARE, AFDC PROGRAM MANUAL, I-H (1979). See also note 230 *supra*.

261. Federal regulations do not require that hearing officers be attorneys, although in some states attorneys comprise all or part of the hearing staff. A telephone survey of fifteen states conducted by the Congressional Research Service found that six states require hearing officers to be attorneys. ADMINISTRATION REPORT, *supra* note 13, at 171-72.

262. *Yee-Litt v. Richardson*, 353 F. Supp. 996, 1000 (N.D. Cal.), *aff'd mem. sub nom. Carleson v. Yee-Litt*, 412 U.S. 924 (1973).

law and of fact, this administrative delay and waste can be avoided.

These conclusions about the appropriate procedures for hearings on questions of law in the welfare context must be considered tentative. The data collected from the Minnesota experience demonstrate only that it is possible for hearing procedures designed to resolve issues of fact correctly to resolve issues of law. It cannot be determined from this study whether such hearing procedures would produce satisfactory results on issues of law elsewhere. It might be, for example, that the success of the Minnesota hearings is in fact attributable to the sense of independence possessed by the particular hearing officers, the administrative climate created by policymakers in the state Department of Public Welfare, or the general tradition of progressive social welfare programs in the state. A comparative study of alternative procedures for the resolution of issues of law in the welfare context would be a fruitful objective for further research.²⁶³

VI. CONCLUSION

This Article reviews the developments that led to the issuance of HEW regulations authorizing states to restrict the hearing rights of welfare recipients through early discontinuation of benefits to those raising issues solely of law. Those regulations were neither carefully nor thoughtfully drafted. They were not formulated to further any agency model of effective hearing procedure, nor to respond to a comprehensive study of state hearing practices under alternative procedures. Rather, the sole motivating force behind this restriction of hearing rights was an effort to grant states as much discretion in the formulation of hearing policy as the law, in HEW's view, permitted. A survey of current state practices under the regulations reveals that a substantial number of states have taken advantage of the discretion given to them by HEW and have chosen to discontinue benefits prior to the decisions on appeals. An analysis of

263. It may be, for example, that improvements in the bureaucratic process through which decisions are made to send notices of intended terminations or reductions to recipients could result in the correction of many errors even before the client is notified of the agency's intended action. Bureaucratic errors might also be corrected prior to hearings if the files were screened by an employee within the agency empowered to negotiate settlements. See generally J. HANDLER, *PROTECTING THE SOCIAL SERVICE CLIENT: LEGAL AND STRUCTURAL CONTROLS ON OFFICIAL DISCRETION* (1979); Mashaw, *The Management Side of Due Process*, *supra* note 187.

the statutory validity and constitutionality of the regulations suggests that, despite the assumptions of HEW, there are substantial questions about the statutory and constitutional validity of the regulations.

One might believe that these regulations do not deserve the extended analysis that they receive here, that the regulations are only ephemeral and are certain to be replaced by more carefully considered provisions when the AFDC program becomes part of a reformed national welfare system. Unfortunately, rather than being discarded in the process of national welfare reform, the AFDC restrictive hearing regulation threatens to become a statutorily mandated rule. A 1978 version of the Carter Administration's welfare reform proposal, the Better Jobs and Income Act, would transform this regulatory policy into statutory language governing all welfare programs. Under that Act, the government would discontinue assistance if the "sole issue for hearing is one of State or Federal law (or change therein)."²⁶⁴ A less comprehensive bill, which has already passed in the House of Representatives, would provide that, in the AFDC program, there would be no entitlement to continuation of benefits pending a hearing if "prior to the hearing, there is a determination that the sole issue for hearing is one of State or Federal law (or change therein) and not one of incorrect payment computation."²⁶⁵ Before this bill or other similar proposals become law, both Congress and the Department of Health and Human Services should give more serious consideration to the provision of adequate hearings for welfare recipients who seek to challenge the legality of administrative actions depriving them of vitally needed welfare benefits.

264. Better Jobs and Income Act, *supra* note 1, § 2144(a)(10).

265. Social Welfare Reform Amendments, *supra* note 1, § 110(b).

APPENDIX

DEFINITIONS AND EXAMPLES OF ISSUE CATEGORIES

I. FACT

An issue of fact is a question concerning whether a phenomenon has happened or is happening independent of or anterior to any assertion as to its legal effect. Although the determination of the question of fact may have important legal effects, the determination of the factual issue itself does not require either the interpretation of a legal standard or the application of facts to a legal standard.

Examples:

1. Whether the man living in the home is the father of the child who is an AFDC beneficiary.
2. Whether the father is working more than twenty hours a week.

II. APPLICATION

An issue is an issue of application if it is resolved by applying a legal standard to the undisputed facts of the particular case. An issue of application is distinguished from an issue of legal definition by the necessity, in the former, to take account of the undisputed facts of the particular case.

Examples:

1. Whether, in light of the nature of the recipient's employment and her personal circumstances, the amount which she spends for child care is "reasonably attributable to the earning" of her income.
2. Whether, in light of the particular parent's medical condition and limited ability to care for the child, the child is "deprived of parental support or care by reason of the . . . physical or mental incapacity of a parent."

III. LEGAL DEFINITION

An issue is an issue of legal definition if its resolution will elaborate, in general terms, the meaning of language in a statute, regulation or constitutional provision.

A. INTERPRETATION

An issue is a question of interpretation if it is a question of legal definition which does not fall within any of the subcategories B through F below.

Examples:

1. Whether sick pay received from a recipient's employer is "earned income" within the meaning of section 402(a)(8) of the Social Security Act.
2. Whether monies deducted from the recipient's paycheck in payment for bankruptcy filing fees may be counted as "net income available for current use" within the meaning of 45 C.F.R. § 233.20(a)(3)(ii)(D).

B. ULTRA VIRES STATE ACTION

An issue concerns ultra vires state action if it challenges the agency's policy or regulation on the ground that such policy or regulation exceeds the agency's authority under state law.

Examples:

1. Whether the imposition of a policy that a recipient who sells a home may not retain the proceeds without reinvestment for more than ninety days is invalid because the agency failed to promulgate its policy according to the rulemaking provisions of the state administrative procedure act.
2. Whether the state may require recipients, as a condition of AFDC eligibility, to participate in a work program created by the agency without any pro-

vision in state law giving the agency authority to establish such a program requirement.

C. CONFLICT WITH STATE LAW

An issue concerns a conflict with state law when the recipient's appeal challenges the legality of a state policy or regulation on the ground that it is in conflict with a substantive provision of state law.

Example:

1. Whether a state policy refusing to permit registrants in the Work Incentive Program to engage in any further training if they are in any way employable is a violation of the state statute which requires that the WIN program have the "objective of assuring, to the maximum extent possible, that the relative . . . will enter the labor force, accept reasonable employment, and become self-sufficient."

D. CONFLICT WITH FEDERAL LAW

An issue concerns a conflict with federal law when the recipient's appeal challenges the legality of a state statute, regulation or policy, or federal regulation on the ground that it is in conflict with a substantive provision of federal law.

Example:

1. Whether a state regulation which does not permit the deduction of child care costs paid to a grandparent is in violation of section 402(a)(7) of the Social Security Act.

E. CONFLICT WITH STATE AND FEDERAL LAW

An issue concerns a conflict with state and federal law when the recipient's appeal challenges the legality of a state statute, regulation or policy, or federal regulation on the ground that it is in conflict with substantive provisions of both state and federal law.

F. UNCONSTITUTIONALITY

An appeal raises an issue of unconstitutionality when the recipient contends that the state or federal law or policy is in conflict with some provision of the United States Constitution.

Example:

1. Whether section 407 of the Social Security Act which limits eligibility to families with an unemployed father and excludes families with an unemployed mother is unconstitutional as a violation of the equal protection component of the due process clause of the fifth amendment.

IV. PROTEST OF POLICY

An appeal is a protest of policy when the recipient does not question the agency's finding of facts or the definition or application of law, but rather challenges the wisdom of a policy of conceded legality.

Examples:

1. Whether the state should include within its AFDC program payments to essential needy relatives living in the home of AFDC recipients where the Social Security Act gives the states an option to include such a program.

2. Whether the agency should pay 100% of recipient need where the Supreme Court has upheld the legality of HEW's permitting the states to pay a percentage of need.

Cases may also be categorized as:

V. OPINION DOES NOT REVEAL ISSUE

